No.48644-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

NOVA CONTRACTING, INC.,

Appellant,

vs.

CITY OF OLYMPIA,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

APPENDICES

Appendix A [2012 WSDOT Standard Specifications]

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the City's termination of a public works contract and the assessment of liquidated damages. Nova was terminated because it failed to provide acceptable "submittals", i.e. documents demonstrating how it would perform environmentally sensitive work when replacing a culvert that was in danger of failing. The City Engineer determined that Nova had failed to adequately demonstrate through Nova's submittals that its work would conform to the specifications and work permits. Nova failed to object to the City Engineer's determination and also failed to cure its deficiencies. As a result the City terminated Nova's contract for default.

Nova filed this lawsuit claiming that the City breached the contract by failing to cooperate with Nova and had therefore violated the duty of good faith and fair dealing. The trial court dismissed Nova's claims on summary judgment due to Nova's failure to support its allegations with material questions of fact. The trial court specifically stated "I simply do not find that Nova has sufficiently raised an issue that there was a breach by the city in not accepting certain submissions."[1]

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[1] Verbatim Report Of Proceedings ("RP") p.28, ll.10-13.

The trial court further stated that "I'm not going to address the stop work order because I don't believe that's relevant in this case."[2]

The trial court was correct on both points. Under the terms of the Contract, the City Engineer had discretion to approve or disapprove submittals. The Contract also provided that Nova was responsible for any delays associated with approval of submittals. Even before Nova received its notice to proceed with the contract, several key submittals were disapproved by the City Engineer and her staff. Nova failed to protest any of the City Engineer's determinations. As a result, the Engineer's determinations concerning the submittals were accepted as a matter of law and any claims to the contrary were waived.

Nova is now attempting to make an end run around the terms of the Contract by arguing that there is a question of fact concerning whether the City Engineer's determinations were made in "good faith." This attempt to avoid the express terms of the Contract was rejected by the trial court and should be rejected here. Nova waived any objection to the City Engineer's determinations including any complaint about "good faith" by failing to file a timely protest. Moreover, the trial court

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[2] RP p.28, ll.14-16.

could not find any indication of such a breach. "I don't find that that's been anything more than a suggestion. It's surely not established in my opinion."[3] In its assignments of error, Nova attempts to create a question of fact by complaining that the trial court employed the incorrect standard, i.e. that it imposed the burden upon Nova to prove "bad faith." But this is incorrect.

The City based its motion upon the express terms of the Contract allowing the City Engineer to exercise her discretion in rejecting submittals. The Contract also placed the risk of obtaining approval of submittals upon the contractor. The uncontested facts showed that prior to issuing its notice of default on September 4, 2014, Nova did not contest any of the City Engineer's determinations. Once the City demonstrated that there were no questions of fact concerning the proper rejection of submittals, the burden shifted to Nova to demonstrate a breach of the duty of good faith performance. Under ***Celotex***[4] and its progeny, Nova had the burden at summary judgment to "make a sufficient showing" supporting a viable breach of contract claim

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[3] RP p.29, ll.18-20.

[4] ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986).

including the alleged failure of good faith performance. As the trial court determined, Nova's pleadings demonstrate a great deal of conjecture, argument, and speculation, but no material questions of fact. Thus Nova failed to carry its burden.

The trial court further determined that liquidated damages were due under the terms of the Contract. The City limited its claim to 45 days – the original time for performance. Nova failed to object to the rate or the number of days. The only arguments raised by Nova were that the liquidated damages provision was unreasonable and therefore unconscionable. This was a legal theory without any factual underpinnings. Nova again failed to carry its burden under ***Celotex***.

The trial court's judgment should be affirmed and the City awarded its fees and costs on appeal in accord with RAP 18.1.

II. RESTATEMENT OF THE CASE

This case involves a public works project for the City of Olympia (the "City") called the Olympia Woodland Trail/Woodard Creek Culvert Improvements project (the "Project"). The work on the Project involved an environmentally sensitive area just south of Interstate 5 near the headwaters of Woodard Creek, a tributary of Henderson Inlet. The Project area is located within then unincorporated Thurston County on real property owned by the City of Olympia.[5]

Woodard Creek is conveyed beneath the Woodland Trail in a 48-inch and 54-inch diameter reinforced concrete culvert. The culvert has deteriorated and is in danger of partial collapse. Beaver activity has also restricted the inlet to the culvert causing flooding of the upstream wetland and adjacent properties. Structural repair of the culvert was required due to the risk of failure.

The City published invitations to bid the repairs required for the Project in early 2014. On or about April 2, 2014, the Project bids were opened and Nova Contracting, Inc. was determined to be the apparent low bidder with a total bid of $281,839.00 plus tax. On April 24, 2014

[5] First Declaration of Fran Eide, City Engineer ("1st Eide Decl.") [CP 217-227].

the City held a pre-award meeting with Nova and received Nova's reassurance that the work could be completed for the bid amount.[6] On May 21, 2014 the City formally awarded the contract to Nova.[7] On May 28, 2014 Nova executed its contract with the City (the "Contract").[8]

Almost immediately thereafter Nova started submitting the shop drawings, material specifications, and other submittals required by the contract documents.[9] On June 2, 2014 the City and Nova met for the pre-construction meeting where the requirement to notify WSDOT prior to construction of the pedestrian detour was discussed. On August 7, 2014 the City and Nova met for a project discussion and the City summarized the remaining critical submittals that would need to be completed before Nova would be allowed to begin work.[10] The August 7, 2014 meeting minutes specifically call out critical submittals that were required by the contract provisions including the various permits

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[6] City Letter May 27, 2014, re: Pre-Award Meeting, City SJ Ex. 1 [CP 68].
[7] City Award Letter, May 21, 2014, City SJ Ex. 2 [CP 70].
[8] Contract, City SJ Ex. 3 [CP 72].
[9] Nova Submittal Timeline, City SJ Ex. 4 [CP 74-75].
[10] City Meeting Summary and Project Schedule, August 7, 2014, City SJ Ex. 5 [CP 77].

required by the City, County, and State.[11] Nova did not object to these requirements at the meeting or in later correspondence.[12]

On August 11, 2014 the City issued its Notice to Proceed.[13] The Notice To Proceed noted the 45 working day completion period that was to begin the next day on August 12, 2014 which was per Nova's previous request and consistent with their progress schedule.[14] According to the Contract, October 14, 2014 was the final day for completion of the Project.[15]

As shown by the Nova Submittal Timeline, Nova fell rapidly behind in obtaining submittal approvals.[16] Consequently, Nova fell further and further behind in mobilizing to the site because the Contract requires that all submittals be approved before Nova could start work.[17] "The following is a list of submittals that must be submitted to the

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[11] Id.
[12] 1st Eide Decl., p.3,¶4, ll.7-8 [CP 219].
[13] Notice To Proceed, August 11, 2014, City SJ Ex. 6 [CP 79].
[14] Id. and 1st Eide Decl., p.3, ll.9-12 [CP 219].
[15] Id.
[16] Nova Submittal Timeline, City SJ Ex. 4 [CP 74-75]. For instance, Submittal No. 7 concerned the Temporary Bypass Pumping Plan and it was rejected starting on August 19, 2014 and never was approved due to Nova's failure to adequately address the City's concerns.
[17] Olympia Special Provisions (the "Special Provisions"), Sec. 7-28.1(4) Submittals, City SJ Ex. 7 [CP 81-82].

Engineer prior to construction per Section 1-06."[18] The Contract requires that "The Contractor shall assume all responsibility and risk for any errors in Contractor submittals."[19] The requirement that all Shop Drawings and other submittals must be approved before construction of the work is provided in the WSDOT Standard Specifications, incorporated in the Contract by reference.[20]

The Contract requires Nova to start construction within ten (10) days or receiving the Notice to Proceed.[21] Even though the City timely responded to Nova's submittals and resubmittals, the time for Nova to mobilize to the site came and went without Nova completing its submittal process.

Nova had previously provided a rudimentary project timeline for completion of the Project dated April 23, 2014.[22] That schedule assumed

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[18] Id.

[19] Special Provisions, Sec. 1-06.1, City SJ Ex. 8 [CP 84].

[20] WSDOT Standard Specifications for Road, Bridge, and Municipal Construction, 2012 (hereinafter the "Std. Spec(s)") City SJ Ex. 9 [CP 88-97]. The Contract incorporates the Std. Specs. by reference, Contract, City SJ Ex. 3 [CP 72].

[21] Special Provisions, Sec. 1-08.4, City SJ Ex. 8 [CP 86].

[22] Nova Progress Schedule, April 23, 2014, City SJ Ex. 10 [99-101].

that Nova would start construction on August 12, 2014 and complete on September 12, 2014.[23]

On August 19, 2014, Steve Sperr, Asst. City Engineer wrote to Nova's Project Manager, Dana Madsen pointing out that Nova was behind schedule and directing Nova to provide a revised project schedule.

> "Mr. Madsen,
> It is clear that NOVA is not able to meet the April 23, 2014 schedule that was submitted to the City at the Pre-Construction Conference. Please submit a revised project schedule as required by Section 1-08.3(3), showing in particular how you intend to complete the work within the Performance Period required by the contract."[24]

Mr. Madsen of NOVA responded that NOVA would not be able to meet the project schedule as follows:

> "Well, of course we can't meet that schedule. We didn't anticipate the rebarbative requirements to be imposed via the multitude of plans required. Each rejected plan requires yet more flaming hoops to jump through so we're not quite sure if anything will ever be approved so that we can actually get to work."[25]

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[23] Id.
[24] City Email, August 19, 2014, 10:07 a.m., City SJ Ex. 11 [CP 103].
[25] Id., Madsen Email, August 19, 2014, 10:56 a.m. [CP 103].

Subsequent emails between the City and Nova ensued with specific deficiencies in the submittals noted to both Mr. Madsen and Mr. Opdahl, President of Nova.[26] All of this had little effect. Nova responded to the City by questioning who it was supposed to be responding to and complaining about contract management and asking "who is in charge?"[27] It must be noted that Nova did not object to the substance of the City's inquiries as to how Nova was going to complete the project given that is was behind schedule. Nor did Nova request additional time to complete the project. Nova expressed its distaste for following the contract's requirements.[28] But Nova did not submit any explanation about how it would adjust its schedule or explain how it was going to meet the contract completion date.

Between August 20, 2014 and September 4, 2014 Nova submitted several more critical submittals including the Pumping Plan (Submittal No. 7), the Erosion/Water Pollution Control Plan (TESC) (Submittal No. 18), the Habitat Boundary Fence (Submittal No. 20), Gravel (Submittal

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[26] [CP 104-114].
[27] Nova Letter, August 25, 2014, City SJ Ex. 12 [CP 103].
[28] Id.

No. 21) and the Work Description Plan (Submittal No. 9), all of which were timely rejected by the City.[29]

As of September 4, 2014, the City had little choice but to notify Nova that it was in default for its failure to provide assurance that it could meet the contract completion date based upon its failure to provide the City with acceptable submittals.[30] Therefore, on September 4, 2014 the City issued its notice of default informing Nova that it had fifteen (15) days to cure the breach of contract and provide adequate assurance of completion.[31]

On September 5, 2014 Nova attempted to mobilize to the site by cutting the City's chain locked gate at the Project site.[32] This was a clear trespass on City property. On September 8, 2014 the City Engineer, Fran Eide, called Nova to complain about the apparent trespass and instruct Nova to remove whatever equipment had been left at the site and to remove temporary traffic signs that had been installed. She also informed Nova that any work was unauthorized and would not be

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[29] See, Submittal Rejections, City SJ Ex. 13 [CP 119-150].
[30] 1st Eide Decl., pp. 5-6 [CP 221-222].
[31] Notice of Default, September 4, 2014, City SJ Ex. 14, [CP 156-158].
[32] 1st Eide Decl., p.6, ¶6, ll.4-10 [CP 222].

compensated. In a subsequent letter dated September 8, 2014, Nova complained to the City about the City ordering Nova to cease and desist, claiming that by virtue of the Notice to Proceed, it had authority to access the Project site and start mobilization.[33]

On September 9, 2014 the City wrote Nova detailing the reasons Nova was not authorized to enter the site or to do any work.[34] The City also noted that a revised project schedule had not been provided.[35] On the same day, September 9, 2014, Nova sent the City a flurry of three letters protesting the Notice of Default and the Stop Work Order.[36] In its Protest Letters, Nova promised a new schedule and contested the City's stated reasons for default but failed to provide any deadline by which Nova would comply with the City's requirement that Nova provide detailed information about how it will complete the work on time. Most importantly, Nova specifically represented that "Nova will be actively pursuing our obligation to cure this termination until September 23,

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[33] Nova Letter September 8, 2014, City SJ Ex. 15 [CP 160-161].
[34] City Letter September 9, 2014, City SJ Ex. 16 [CP 164].
[35] Id.
[36] Nova Protest Letters (the "Protest Letters"), September 9, 2014, City SJ Ex. 17 [CP 168-178].

2014. Nova will prepare and present documentation refuting the alleged termination for default."[37]

On September 18, 2014 the City responded to the Nova Protest Letters by denying the protests.[38] The City pointed out the requirement that Nova provide complete and accurate submittals was clear in the specifications and the plans.[39]

As of September 18, 2014, Nova had not received approval of several critical submittals including the TESC plan, Temporary Pump Bypass, and Work Description.[40] These submittals were not mere formalities.[41] They establish what the contractor plans to do in order to accomplish the work.[42] These details include how the contractor intends to protect the environment while performing the work.[43] Without sufficient details, the resulting work could cause significant damage to the environmentally sensitive areas and could result in serious sanctions against the City and Nova including fines, criminal sanctions, and

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[37] Id. at [CP 171].
[38] City Protest Responses, September 18, 2014, City SJ Ex. 18 [CP 180-188].
[39] Id. at [CP 180-182].
[40] See, Nova Submittal Timeline, City SJ Ex. 4 [CP 74-75].
[41] 1st Eide Decl., p.7, ¶8 [CP 223-224].
[42] Id.
[43] Id.

environmental damage claims.[44] Therefore the City had the right to insist on detailed submittals in order to avoid these adverse outcomes.[45]

Nova failed to provide the required submittals.[46] Nova filed its claim for compensation due to delays on September 19, 2014 and reiterated Nova's refusal to comply with the City's request for acceptable submittals and schedules.[47] Nova failed to provide any assurance of its ability to complete the work and failed to provide any assurance that acceptable submittals would be forthcoming.[48] Nova's September 19, 2014 letter was a refusal to comply with the City's demand to cure the defaults.[49] As a result the City issued its Termination for Default on September 24, 2014.[50]

The Project has now been delayed until at least the summer of 2016.[51] Liquidated damages are due under the terms of the Contract computed at the daily amount of $939.46.[52] The number of days the

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[44] Id.
[45] Id.
[46] Id.
[47] Protest Documentation, September 19, 2014, City SJ Ex. 19, [CP 190-216].
[48] Id.
[49] 1st Eide Decl., p.8, ¶8 [CP 224].
[50] Termination For Default, September 24, 2014, Ex. 20, Attached.
[51] 1st Eide Decl., p.8, ¶8 [CP 224].
[52] Id. at [CP 225].

project is overdue is 486 days computed from October 14, 2014 to February 12, 2016.[53] The City stipulated for purposes of summary judgment to accept forty-five (45) days of liquidated damages based upon the original time period for contract performance.

Nova originally claimed entitlement to damages for work performed plus consequential damages for lost profit and overhead.[54] Under the Standard Specifications, no adjustment to the contract price is allowed for lost profits or consequential damages.[55] In addition Nova claims compensation for work performed, but any work performed was not authorized and was defective in any case.[56] However, Nova has not contested on appeal the trial court's dismissal of these claims on summary judgment.

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[53] Id.
[54] Id. at [CP 225].
[55] See, Std. Spec. 1-09.4, City SJ Ex. 9 [CP 97].
[56] Eide Decl., p.8, ¶8 [CP 225].

III. ISSUES ON APPEAL

A. The City Properly Terminated Nova For Default

Where Nova failed to present material questions of fact concerning the City Engineer's exercise of discretion in rejecting submittals, was the City entitled to summary judgment?
[Assignments Of Error, 1-3][57]

Answer: Yes

B. Nova Failed To Protest The Engineer's Rejection Of Submittals

Where Nova failed to comply with the Contract's claim notice provisions was the City entitled to summary judgment?
[Assignments Of Error, 1-3]

Answer: Yes

C. Nova Failed To Contest The Rate Or Duration Of Liquidated Damages.

Where Nova failed to raise any arguments regarding the rate or duration of liquidated damages was the City entitled to summary judgment?
[Assignment Of Error, 4]

Answer: Yes

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[57] The Assignments of Error to which each issue relates are stated in brackets.

IV. LEGAL ARGUMENT

A. The City Properly Terminated Nova For Default

1. Standard On Summary Judgment

The requirements on a motion for summary judgment are well known:

> On summary judgment, the moving party bears the initial burden of proving that there is no genuine issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party meets its initial burden, the nonmoving party must present evidence that material facts are in dispute. *Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1*, 164 Wn. App. 641, 654, 266 P.3d 229 (2011). It cannot rely on mere allegations, speculation, or argumentative assertions that unresolved factual issues remain. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). If the nonmoving party fails to do so, then summary judgment is proper. *Atherton Condo. Apartment–Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn .2d 506, 516, 799 P.2d 250 (1990).[58]

This Court's review is de novo. Thus the trial court's commentary concerning the law and facts is not binding upon this Court. This Court may uphold the trial court's decision on any basis allowed by law.

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[58] ***Mettler v. Gray Lumber Co.***, 170 Wn. App. 1030 (2012)

2. Nova Failed To Demonstrate The Existence Of Any Material Question Of Fact Concerning The City's Alleged Breach Of The Duty Of Good Faith Performance

Nova's first three Assignments Of Error and its first three Issues On Appeal address the same legal issue, -- whether Nova demonstrated the existence of any material question of fact that the City breached the duty of good faith performance.

a. Nova Had The Burden To Make A Showing Sufficient To Establish A Genuine Issue Of Material Fact

> "[W]e consider all of the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party." *Atherton Condo. Apartment Owners–Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). But "[t]he nonmoving party must set forth specific facts that demonstrate a genuine issue of material fact and cannot rest on mere allegations." *Curtis*, 150 Wn.App. at 102, 206 P.3d 1264. We affirm summary judgment if the nonmoving party " 'fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'[59]

The trial court applied the proper standard. The trial court stated "I'm going to grant summary judgment. My bases [sic] for doing so is

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[59] ***Young v. Key Pharms., Inc.*** 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

while there are lots of issues that could be talked about as to what occurred, then it occurred, why it occurred, I don't find that after the city made their motion for summary judgment that Nova in their response raised a sufficient issue by the standard that's required."[60] The Court went on to say that it did not have to address the evidentiary standard regarding the City's actions "I don't think I have to make that decision, I simply do not find that Nova has sufficiently raised an issue that there was a breach by the city in not accepting certain submissions."

Nova claims that this shows some sort of weighing of the evidence, but that is not the case. Under ***Celotex***, Nova had the burden to make a "sufficient showing" that a material question of fact exists. The trial court found that Nova's efforts were insufficient. Nova has failed again in this appeal to demonstrate such facts.

b. The City Properly Terminated Nova – There Was No Breach Of Contract Because The City Properly Exercised Its Discretion In Rejecting Submittals And Terminating Nova

The Contract provides that the approval of drawings and submittals is at the discretion of the Engineer and those decisions are

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[60] RP pp. 27:20 – 28:13

final.[61] The Contract also provides that any risk associated with submittals is solely the Contractor's; "The Contractor shall bear all risk and all costs of any Work delays caused by nonapproval of these drawings or plans."[62]

Thus the risk of non-approval of the submittals was allocated to Nova, and the determination of whether the submittals are adequate and whether they meet the requirements of the Plans and Specifications rested with the Engineer.

The standard of review to be applied to the Engineer's actions in this instance is whether the Engineer's decision was "arbitrary and capricious."

> This court has this question presented to it constantly in cases arising under Government contracts, where the contracting officer and the head of the department are given the power to render final decisions on questions of fact. Both this Court and the Supreme Court have many times held that if the decision is arbitrary or capricious or so grossly erroneous as to imply bad faith, it will be set aside. See, e.g. *Burchell v. Marsh,* 17 How. 344, 349, [15 L.Ed. 96], *Kihlbert v. United States,* 97 U.S. [Otto] 398 [24 L.Ed. 1106]; *United States v. Gleason,* 175 U.S. 588, 602 [20 S.Ct. 228, 233, 44 L.Ed. 284]; *Ripley v. United States,* 223 U.S. 695, 701 [32 S.Ct. 352, 355, 56 L.Ed. 614].[63]

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[61] Std. Spec. 1-05.1, City SJ Ex. 9, p.5 [CP 92].
[62] Std. Spec. 1-05.3, City SJ Ex. 9, p.6 [CP 93].
[63] ***Darwin Const. Co., Inc. v. United States***, 811 F.2d 593, 598 (Fed. Cir. 1987)

The arbitrary and capricious standard of review requires that the City's action be without consideration and in disregard of facts and circumstances.

> Arbitrary and capricious action has been defined as willful and unreasoning action, without consideration and in disregard of facts and circumstances. Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.[64]

There are no facts presented by Nova that indicate the City's actions in rejecting the submittals from Nova were arbitrary or capricious. Nova indicated some disagreement with the City's decisions,[65] but there is nothing that indicates the City failed to exercise its discretion in good faith or that it was arbitrary or capricious at the time it rejected the submittals. Mr. Madsen admitted in deposition that

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[64] ***Pierce Cty. Sheriff v. Civil Serv. Comm'n of Pierce Cty.***, 98 Wn.2d 690, 695, 658 P.2d 648, 651-52 (1983)

[65] See, e.g. Deposition Transcripts of Dan Madsen, City SJ Ex. 25 [CP 475-503] and Frank Pita [City SJ Ex. 26, [CP 504-517]. Mr. Madsen's characterization of his impression of the City's attitude is particularly telling regarding his confrontational attitude, See, Ex. 25 p.3, ll. 1-4 [CP 477] "We don't give a rat's ass what you submit. . ." This statement was identified by Mr. Madsen as his impressions of the City's review process; however he admits he never expressed this view to the City.

he never asked for more time or for more costs during the submittal review process.[66]

It must also be noted that Washington does not recognize a free floating duty of "good faith performance" outside of the terms of the Contract:

> There is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance. *Metropolitan Park Dist. of Tacoma v. Griffith,* 106 Wn.2d 425, 437, 723 P.2d 1093 (1986); *Lonsdale v. Chesterfield,* 99 Wn.2d 353, 357, 662 P.2d 385 (1983); *Miller v. Othello Packers, Inc.,* 67 Wn.2d 842, 844, 410 P.2d 33 (1966). However, the duty of good faith does not extend to obligate a party to accept a material change in the terms of its contract. *Betchard-Clayton, Inc. v. King,* 41 Wn. App. 887, 890, 707 P.2d 1361, *review denied,* 104 Wn.2d 1027 (1985). Nor does it "inject substantive terms into the parties' contract". **Rather, it requires only that the parties perform in good faith the obligations imposed by their agreement**. *Barrett v. Weyerhaeuser Co. Severance Pay Plan,* 40 Wn. App. 630, 635 n. 6, 700 P.2d 338 (1985). Thus, the duty arises only in connection with terms agreed to by the parties. *See Matson v. Emory,* 36 Wn. App. 681, 676 P.2d 1029 (1984); *Lonsdale v. Chesterfield,* 99 Wn.2d 353, 662 P.2d 385 (1983); *CHG Int'l, Inc. v. Robin Lee Inc.,* 35 Wn. App. 512, 667 P.2d 1127, *review denied,* 100 Wn.2d 1029 (1983); *Miller v. Othello Packers, Inc.,* 67 Wn.2d 842, 843-44, 410 P.2d 33 (1966).[67]

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[66] Madsen Dep. p.34, 1.24 – p.35, 1.2, City SJ Ex. 25, [CP 479].

[67] ***Badgett v. Sec. State Bank***, 116 Wn.2d 563, 569-70, 807 P.2d 356, 360 (1991) (emphasis added).

In ***Tacoma Auto Mall v. Nissan***, this Court recently considered the same line of cases cited by Nova and rejected the proposition that a party exercising its legal rights under a contract had additional duties of conduct outside of the terms of the contract.

> Exercising one's legal interests in good faith is not improper interference. *Leingang,* 131 Wn.2d at 157, 930 P.2d 288. " 'A defendant who in good faith asserts a legally protected interest of his own which he believes may be impaired by the performance of a proposed transaction is not guilty of tortious interference.' " *Birkenwald Distrib. Co. v. Heublein, Inc.,* 55 Wn. App. 1, 10, 776 P.2d 721 (1989) (quoting *Brown v. Safeway Stores, Inc.,* 94 Wn.2d 359, 375, 617 P.2d 704 (1980); *see also Plumbers and Steamfitters Union Local 598 v. Wn. Pub. Power Supply Sys.,* 44 Wn. App. 906, 920, 724 P.2d 1030 (1986)) ("[I]nterference [with a business expectancy] is justified as a matter of law if the interferer has engaged in the exercise of an absolute right equal or superior to the right which was invaded.").
>
> *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.,* 86 Wn. App. 732, 935 P.2d 628 (1997) is instructive. There, the tire company contracted with a dealer to provide products for sale in the dealer's stores. *Goodyear,* 86 Wn. App. at 736, 746, 935 P.2d 628. In the dealer contracts, the tire company reserved the right to open its own stores in the dealer's territory. *Goodyear,* 86 Wn. App. at 736, 746, 935 P.2d 628. The tire company ultimately opened such stores and sold its products at competitive prices; the dealer lost customers and went bankrupt. *Goodyear,* 86 Wn. App. at 737–38, 935 P.2d 628. When Goodyear sued the dealer owners individually (as guarantors) for open account balances owed to the tire

> company, the dealer counterclaimed asserting, in part, tortious interference with its customer contracts and business opportunities. *Goodyear,* 86 Wn. App. at 737–38, 935 P.2d 628.[68]

This Court determined in ***Tacoma Auto Mall*** that the specific terms of the agreement between the parties allowed the original seller of a car dealership to withhold consent to a proposed sale of the same car dealership. Thus the contract specifically allowed the actions taken by the seller and there was no evidence of bad faith.[69]

Similarly, the City Engineer had discretion to reject submittals and the risk of such rejection was placed on Nova.[70] There is no showing by Nova of facts indicating that the City breached its duties. Nova bases its entire appeal on the unsupported conjecture of Mr. Pita. He stated his "opinion" that Nova's submittals should have been "approved or approved conditionally" but states no factual basis for this opinion – Mr. Pita's Declaration is simply argument dressed up as evidence.[71] He cites no objective authority, contract provisions,

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[68] ***Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.***, 169 Wn. App. 111, 132–33, 279 P.3d 487, 498–99 (2012)
[69] Id.
[70] Std. Spec. 1-05.1, City SJ Ex. 9, p.5 [CP 92].
[71] Pita Decl., [CP 250-255.]

applicable law, or recognized industry standards. Essentially, Mr. Pita is saying "it is because I say so."

Mr. Pita then equivocates by stating: "To be fair, in my opinion, several of Nova's original submittals were inadequate and were properly rejected by the City with a request that Nova correct them."[72] Mr. Pita also admitted in his deposition that the City was entitled to terminate Nova: "I said in several of the submittal processes I thought NOVA was a little lacking in some of their initial submittals"[73] and "I don't know that they ever gave them [the City] sufficient assurance . . . they probably did not."[74] Mr. Pita also admitted that it is at the discretion of the City as to whether they have received adequate assurance of performance.[75] Mr. Pita further admits that as of September 17, 2014 Nova had not met its obligations to provide a complete and accurate submittal in regard to what materials they would use in constructing an access roadway.[76] This was only two days before the 15 day time limit for responding to the Notice of Default expired.

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[72] Pita Decl., p.9, ¶17 [CP 253]
[73] Pita Dep., p.37, ll.3-6 [CP 507]
[74] Id. at p.46, ll.2-20, [CP 509]
[75] Id at p.47, ll.1-2, [CP 509]
[76] Id at p.54, ll.4-15. [CP 511]

Finally, Mr. Pita admits that in his opinion the City was justified in terminating Nova:

> "From my vantage point it would seem that the City does have – I mean, they have a contract and something has to be done with the contract if the thing's not going to be built. So yes, they should be able to terminate them."[77]

The trial court disregarded such flimsy proof and so should this Court. Such unsupported and contradictory opinions are not proof and should be disregarded. An expert witness opinion on summary judgment must be backed up with admissible facts.

> Expert opinions must be based on the facts of the case and will be disregarded entirely where the factual basis for the opinion is found to be inadequate. *Prentice Packing & Storage Co. v. United Pac. Ins. Co.,* 5 Wn.2d 144, 106 P.2d 314 (1940); *Theonnes v. Hazen,* 37 Wn. App. 644, 681 P.2d 1284 (1984).
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> In the context of a summary judgment motion, an expert must back up his opinion with specific facts. *United States v. Various Slot Machines on Guam,* 658 F.2d 697, 700 (9th Cir.1981).[78]

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[77] Id. at p.83, ll.12-16 [CP 515].

[78] ***Hash by Hash v. Children's Orthopedic Hosp.***, 49 Wn. App. 130, 134–35, 741 P.2d 584, 586 (1987), aff'd and remanded sub nom. ***Hash by Hash v. Children's Orthopedic Hosp. & Med. Ctr.***, 110 Wn.2d 912, 757 P.2d 507 (1988)

Mr. Pita's opinions are not proof. He cites no specific facts indicating that the City did anything in violation of its contractual duties. In fact he admits the City did everything right and then attempts to contradict his deposition testimony with his declaration. It is well established law that subsequent testimony that contradicts a prior deposition should not be allowed.[79]

Under the terms of the Contract, the City had a duty to timely review submittals. It had the discretion to reject them and the risk of rejection was specifically allocated to Nova. There is no showing that the City failed in this regard. There is also no showing that the City's decision to reject submittals was in bad faith or that it was arbitrary or capricious. Nova's list of accepted and rejected submittals shows that

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[79] Self-serving affidavits contradicting prior depositions cannot be used to create an issue of material fact. " 'When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.' " *Klontz v. Puget Sound Power & Light Co.,* 90 Wash.App. 186, 192, 951 P.2d 280 (1998) (quoting *Marshall v. AC & S, Inc.,* 56 Wash.App. 181, 185, 782 P.2d 1107 (1989)).

McCormick v. Lake Washington Sch. Dist., 99 Wn. App. 107, 111, 992 P.2d 511, 513–14 (1999)

numerous submittals were accepted and that others were evaluated and rejected.[80]

As admitted by Nova's expert, under the terms of the Contract, the City had a right to terminate for default "If the remedy does not take place to the satisfaction of the Contracting Agency, the Engineer may, by serving written notice to the Contractor and Surety . . . Terminate the Contract . . ."[81] Nova failed to provide acceptable submittals and the City Engineer exercised her discretion to hold Nova in default.

The standard to apply to that determination is whether the City Engineer's decision was arbitrary and capricious.

> Generally, the arbitrary and capricious standard governs judicial review of discretionary administrative decisions of local government. *See Backlund v. Board of Comm'rs of King Cy. Hosp. Dist. 2,* 106 Wn.2d 632, 647–48, 724 P.2d 981 (1986) (applying the arbitrary and capricious standard to county denial of a doctor's hospital privileges), *appeal dismissed,* 481 U.S. 1034, 107 S.Ct. 1968, 95 L.Ed.2d 809 (1987). Moreover, when we review agency action under our inherent power of review we limit our review to determining whether the agency action is arbitrary and capricious. *See Pierce Cy. Sheriff v. Civil Serv. Comm'n,* 98 Wn.2d 690, 658 P.2d 648 (1983); *Williams v. Seattle Sch. Dist. 1,* 97 Wn.2d 215, 221–22, 643 P.2d 426 (1982). Review of administrative action pursuant to statute is also usually governed by the

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[80] Submittal Timeline, City SJ Ex. 4, [CP 74-75].
[81] Std. Spec. 1-08.10(1), City SJ Ex. 9, p.8, [CP 95].

> arbitrary and capricious standard. *Haynes v. Seattle Sch. Dist. 1,* 111 Wn.2d 250, 254, 758 P.2d 7 (1988), *cert. denied,* 489 U.S. 1015, 109 S.Ct. 1129, 103 L.Ed.2d 191 (1989).[82]

There was no evidence that the City Engineer acted improperly regardless of what standard is applied. This was admitted by Nova's own expert, Frank Pita, where he confirms in his declaration that the City did not act improperly in rejecting submittals but was required to process them efficiently:

> "18. It is my understanding that **Nova is not claiming that the City acted improperly by reasonably rejecting submittals**, but the City is obligated to reasonably review submittals in an efficient manner reasonably calculated to advance project performance and to allow the Contractor to perform the work."[83]

There was no showing by Nova that the City was inefficient, only that Nova did not like the results. Moreover, at no time did Nova object to the City's rejection of submittals or the method of review until after the City issued its Notice of Default on September 4, 2014.[84]

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[82] ***Washington Waste Sys., Inc. v. Clark Cty.***, 115 Wn.2d 74, 80, 794 P.2d 508, 512 (1990) (Decision by administrative agency to accept bid of waste disposal contractor was upheld because there was no evidence of arbitrary or capricious action.)

[83] Pita Declaration, p.9, ¶18 [CP 253].

[84] 1st Decl. Fran Eide, p.5, ll.6-11 [CP 221].

The City had more than enough good faith basis to find Nova in default. The uncontested facts show that Nova was seriously behind schedule well before the City issued its September 4, 2014 Notice of Default. Nova's initial project schedule showed a completion of the submittal process ending on August 11, 2014.[85] The City had indicated in the pre-construction meeting on August 7, 2014 with Nova how important certain submittals were to performance of the project.[86] Yet Nova repeatedly failed to provide adequate submittals to the City for the most critical items.[87]

The undisputed facts demonstrate good cause for the City holding Nova in default. On August 19, 2014 the City gave Nova a directive to provide a new schedule to demonstrate its ability to complete on time:

"It is clear that NOVA is not able to meet the April 23, 2014 schedule that was submitted to the City at the Pre-Construction Conference. Please submit a revised project schedule as required by

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[85] Nova Progress Schedule, April 23, 2014, City SJ Ex. 10 [CP 99-101].
[86] City Meeting Summary and Project Schedule, August 7, 2014, City SJ Ex. 5 [CP 77].
[87] Nova Submittal Timeline, City SJ Ex. 4 [CP 74-75].

Section 1-08.3(3), showing in particular how you intend to complete the work within the Performance Period required by the contract."[88]

Mr. Madsen of Nova immediately responded with the admission that Nova cannot meet the previous schedule:

"Well, of course we can't meet that schedule. We didn't anticipate the rebarbative requirements to be imposed via the multitude of plans required. Each rejected plan requires yet more flaming hoops to jump through so we're not quite sure if anything will ever be approved so that we can actually get to work."[89]

When Mr. Sperr from the City attempted to contact Mr. Opdahl with his request for assurances of performance he was met with a similar statement indicating a lack of compliance. Mr. Opdahl responded, "I'm a bit confused as to how submittal information is keeping us from performing the work. Talking about doing the work and actually doing the work are two different things."[90]

Despite the City's attempts to obtain compliance with the contract requirements to provide detailed and complete submittals and updated

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[88] City Email, August 19, 2014, 10:07 a.m., City SJ Ex. 11 [CP 103].
[89] Id., Madsen Email, August 19, 2014, 10:56 a.m., [CP 103.]
[90] Id, Opdahl Email, August 20, 2014 [CP 105.]

schedules, Nova continued to submit essentially the same deficient information and drawings as in the previously rejected submittals.[91] Moreover, Nova failed to provide any updated project schedule. As of September 4, 2014 the City was in the process of rejecting yet again another batch of key submittals.[92]

The Contract Special Provisions and the Std. Specs. provide that providing acceptable shop drawings and submittals are the contractor's responsibility. The City had the right to exercise its discretion in rejecting submittals and Nova failed to protest any of the City's reasons for doing so. As of September 4, 2014, when the City declared Nova in default, the City had rejected multiple submittals as was its right under the Contract.

Nova's attempt to create a question of fact by relying on ***Rekhter v. Dep't of Soc. & Health Servs.*** is misplaced. In ***Rekhter*** the Court determined that the implied duty of good faith applied outside of the express terms of the contract where one party reserved discretion to determine future terms of the contract.

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[91] 2nd Eide Decl., pp.8-11, [CP 541-544.]

[92] See, Submittal Rejections, September 4, 2015, City SJ Ex. 13 [CP 119-154].

DSHS and the providers agree that the implied covenant of good faith and fair dealing cannot add or contradict express contract terms and does not impose a free-floating obligation of good faith on the parties. Instead, "the duty [of good faith and fair dealing] arises only in connection with terms agreed to by the parties." *Id.; Johnson v. Yousoofian,* 84 Wn. App., 755, 762, 930 P.2d 921 (1996) ("The implied duty of good faith is derivative, in that it applies to the performance of specific contract obligations. If there is no contractual duty, there is nothing that must be performed in good faith." (citations omitted)).

In particular, the duty of good faith and fair dealing arises "when the contract gives one party discretionary authority to determine a contract term." *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.,* 86 Wn.App. 732, 738, 935 P.2d 628 (1997); *see Amoco Oil Co. v. Ervin,* 908 P.2d 493, 498 (Colo.1995) ("The duty of good faith and fair dealing applies when one party has discretionary authority to determine certain terms of the contract, such as quantity, price, or time."). When asked to apply Washington law in this area, the Ninth Circuit concluded that "[g]ood faith *limits* the authority of a party retaining discretion to interpret contract terms; it does not provide a blank check for that party to define terms however it chooses." *Scribner v. Worldcom, Inc.,* 249 F.3d 902, 910 (9th Cir.2001).

In this case, the contract gave DSHS discretion over future terms. DSHS has a specific contractual obligation to determine and pay providers for hours authorized in the service plans. DSHS prepared the service plans after the contract was formed with the providers and after the providers began performing services. Thus, at the time that DSHS and an individual provider executed a provider contract, neither DSHS nor the provider knew what services would be needed by the clients or how much would be paid to the providers. **These provisions give DSHS the discretion to set a future contract term: the**

quantity of hours and the types of services for which providers will be compensated.[93]

Nova significantly misstates the holding of ***Rekhter*** in its brief. Nova says that the holding applies to require any party with "discretionary authority under the contract . . . reasonably."[94] ***Rekhter*** does not say that. Nowhere in the opinion does it employ the term "reasonably." This is a construct by Nova and significantly misstates the holding. There is no reasonableness standard to be applied to the City's rejection of submittals.

The holding in ***Rekhter*** actually supports the City's contention that there is no duty of good faith where one party has unrestricted authority to determine a contract term.

> ". . . the duty of good faith and fair dealing arises when a contract gives a party discretionary authority to determine a contract term. *See Goodyear Tire,* 86 Wn.App. at 738, 935 P.2d 628. However, if a contract gives a party unconditional authority to determine a term, there is no duty of good faith and fair dealing. *See Yousoofian,* 84 Wn. App. at 762–63, 930 P.2d 921 **(where landlord had an "absolute privilege" to refuse to consent to a tenant's lease assignment, there was no**

[93] ***Rekhter v. State, Dep't of Soc. & Health Servs.***, 180 Wn.2d 102, 112–14, 323 P.3d 1036, 1041–42 (2014) (emphasis added.)

[94] Appellant Brief, p.15.

contractual duty to which the duty of good faith attached)."[95]

Here, the City had total authority to determine whether to accept or reject Nova's submittals. The Contract specifically provides that decisions of the Engineer in this regard are "final."[96] Thus under ***Rekhtor*** there could be no contractual duty to which the duty of good faith performance could attach due to the fact that the Contract expressly reserved the determination of whether to accept the submittals to the Engineer. There was also no indication of an arbitrary and capricious decision by the City Engineer. Thus the trial court was absolutely correct in holding that there was no adequate showing by Nova of a breach by the City. Nova's first three claims of error therefore fail.

c. Nova Waived Its Claims Concerning The Rejected Submittals By Failing To File A Timely Protest

Nova also waived all of its claims concerning the rejected submittals because at no time prior to the City issuing the Notice of Default on September 4, 2014[97] did Nova provide a written protest of the City's rejection of its submittals.

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[95] ***Rekhter v. State, Dep't of Soc. & Health Servs.***, 180 Wn.2d 102, 119–20, 323 P.3d 1036, 1044–45 (2014) (emphasis added).
[96] Std. Spec. 1-05.1, City SJ Ex. 9, [CP 92].
[97] Notice of Default, September 4, 2014, City SJ Ex. 14, [CP 156-158].

Section 1-04.5 of the Contract required that Nova protest if it disagreed with any determination of decision of the Engineer:

> If in disagreement with anything required in a change order, another written order, or an oral order from the Engineer, including any direction, instruction, interpretation, or determination by the Engineer, the Contractor shall:
>
> 1. Immediately give a signed written notice of protest to the Project Engineer or the Project Engineer's field Inspectors before doing the Work; . . .[98]

By failing to follow these procedures "the Contractor completely waives any claims for protested Work."[99] The effect of Nova failing to protest the City's repeated rejections of its submittals is a waiver of their claims they now belatedly assert, i.e. that the City's actions in rejecting the submittals were improper, unreasonable, etc.

Nova indicated some frustration regarding the submittals as stated by Mr. Madsen in his email to the City dated August 19, 2014:

> "Well, of course we can't meet that schedule. We didn't anticipate the rebarbative requirements to be imposed via the multitude of plans required. Each rejected plan requires yet more flaming hoops to jump through so we're not quite sure if anything will ever be approved so that we can actually get to work."[100]

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[98] Std. Spec. 1-04.5, City Ex. 9, p.3.
[99] Id.
[100] *Id.*, Madsen Email, August 19, 2014, 10:56 a.m., City SJ Ex. 11, p.1 [CP 103].

But at no time before the City issued the September 4, 2014 Notice of Default[101] did Nova file a written protest as required by Std. Spec. 1-04.5.[102] Thus any claims that the City unreasonably rejected the submittals, etc. prior to September 4, 2014 were waived.[103] Even in its letter dated August 25, 2014 where Nova complains about project management, Nova does not state any protest indicating that it considers the City's actions to be arbitrary, capricious, or in bad faith.[104] In fact, Nova confirmed that the reason for the defective submittals was a lack of information, not a breach of duty by the City:

> "The City has rejected some of our submittals based upon lacking information. Since NOVA based our submittals on the project design requirements and specifications then the City's design is lacking information. Please be advised that if additional procedures are required above and beyond what is specified in the contract specifications this will constitute a changed condition and a claim will be filed. NOVA is not

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[101] Sept. 4, 2014 Notice Of Default, City SJ Ex. 14, [CP 156-158.]
[102] 2nd Eide Decl., p. 8, ll.16-17 [CP 541].
[103] ***Mike M. Johnson, Inc. v. Cty. of Spokane***, 150 Wn.2d 375, 78 P.3d 161 (2003) (Holding that a contractor's failure to protest work under an older version of the Standard Specifications (which contained a version of section 1-04.5) precluded a lawsuit claiming extra compensation or delays related to that work.)
[104] Nova Letter, August 25, 2014, City SJ Ex. 12 [CP 116-117.]

the designer of this project **nor will it submit any information** that can be perceived as such."[105]

Thus Nova admitted it was not submitting a protest or claim.

If Nova had filed a timely protest, the parties might have had a chance to correct the situation, but by September 4, 2014 the project was already far behind schedule and Nova refused to comply with the City's direction to correct the submittals. Thus Nova waived any claims regarding the rejected submittals.

3. Nova Failed To Cure Its Default

Once it received the Notice of Default, Nova swung into full "paper the file" mode. It responded with a letter dated September 8, 2014 complaining about the stop work order but did not address any of the items in the Notice of Default.[106] It then wrote three letters dated September 9, 2014 wherein it complained about the City's administration of the contract, that the City had failed to define the scope of work, and "the City continues to manipulate the design of the project through the submittal process."[107] Despite these complaints and observations Nova

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[105] Id. (emphasis added.)
[106] Nova Letter September 8, 2014, City SJ Ex. 15 [CP 160].
[107] Nova Protest Letters (the "Protest Letters"), September 9, 2014, City SJ Ex. 17 [CP 168-178].

did not request additional time.[108] Rather it continued to argue with the City over whether it was required to provide the requested information.[109] It never cured its defaults, i.e. providing acceptable submittals or providing a workable schedule.[110]

It must be noted that Nova has not appealed whether the City properly issued the Notice of Termination, nor could it. Once the default was determined by the Engineer, Nova had an absolute duty to cure the default. It did not cure the default and was therefore correctly terminated.[111] Nova has only appealed the basis for the default, i.e. the rejection of submittals.

The Contract specifically requires the contractor to continue performance as ordered by the Engineer. "In spite of any protest or dispute, the Contractor shall proceed promptly with the Work as the Engineer orders."[112]

Refusing to perform, i.e. to provide timely and accurate progress schedules and submittals, is simply not an option under the Contract.

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[108] Madsen Dep., City SJ Ex. 25, p.34 ll.24 – p.35 ll.2, [CP 479].
[109] Id.
[110] 2nd Eide Decl., p.9, [CP 542].
[111] Id.
[112] Std. Spec. 1-04.5, City SJ Ex. 9 [CP 91].

The continuing failure of Nova to submit the requested information and submittals was a continuing breach of the Contract and justified termination. As a result, the City properly issued its Termination for Default on September 24, 2014.[113]

According to the terms of the Contract, the Engineer retained discretion to determine whether it was satisfied with the submittals by Nova.[114] Nova didn't even try to comply with the directives of the Engineer. Rather Nova wanted to argue about whether the plans and specifications were sufficient and whether the Engineer's directives represented some sort of compensable change. That was not the question in terms of whether the Contract could be properly terminated.

The uncontested facts are as follows: 1) Nova was behind schedule, 2) Nova was not receiving approvals of its submittals and could not start construction before approvals were obtained, 3) The City required certain information to be included in the submittals, and 4) Rather than do its utmost to provide that information in the submittals, Nova refused by blaming the City's contract management. Under these

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[113] See, Pita Dep., p.83, ll.12-16, [CP 515].
[114] Std. Spec. 1-05.1, City SJ Ex. 9, [CP 92].

circumstances, the City was absolutely entitled to terminate Nova for default.

4. The City's Liquidated Damages Provision Is Enforceable as a Matter of Law

A provision for liquidated damages will be upheld unless it constitutes a penalty or is otherwise unlawful.[115] Washington follows the United States Supreme Court's view that liquidated damages agreements fairly and understandingly entered into by experienced, equal parties with a view to just compensation for the anticipated loss should be enforced.[116]

Whether a liquidated damages clause is enforceable requires application of the appropriate test as of the time of contract formation.[117] Washington has adopted a two-part test to determine whether a liquidated damages clause is enforceable. Liquidated damages clauses are upheld if (1) the amount fixed is a reasonable forecast of just compensation for harm caused by breach, and (2) the harm is difficult to ascertain.[118]

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[115] ***Wallace Real Estate Inv. v. Groves***, 124 Wn.2d 881, 886, 881 P.2d 1010 (1994) (citing *Walter Implement, Inc. v. Focht*, 107 Wn .2d 553, 558, 730 P.2d 1340 (1987)).

[116] ***Walter Implement v. Focht***, 107 Wn.2d at 558 (citing *Wise v. United States*, 249 U.S. 361, 39 S.Ct. 303, 63 L.Ed. 647 (1919)).

[117] ***Watson v. Ingram***, 124 Wn.2d 845, 851, 881 P.2d 247 (1994).

[118] ***Id.*** at 850.

Actual damages are irrelevant except as evidence of the reasonableness of the liquidated damages estimate at the time of contract formation.[119] Actual damages may also be considered where they are so disproportionate to the estimate that to enforce the estimate would be unconscionable.[120] It is not unusual to decide on summary judgment whether a liquidated damages clause is reasonable.[121]

Nova argues that "there is great doubt as to whether the City has suffered any damages at all," and cites no declaration, affidavit, or legal authority, for that assertion or its relevance.[122] "Generally speaking, the burden is on the party who defaults on the contract to prove that a liquidated-damages clause is unenforceable."[123]

The Declaration of Fran Eide in Support of Motion for Summary Judgment made clear that the liquidated damages amount is reasonable: "A review of the City's time records and engineering time indicates the City has spent much more than the amount of liquidated damages on this

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[119] ***Id.*** at 851.

[120] *Id.* at 893-94.

[121] ***See Knight, Vale & Gregory v. McDaniel***, 37 Wn. App. 366, 371-72, 680 P.2d 448, 452 (1984) (upholding the trial court's determination on summary judgment that the liquidated damages clause is reasonable); *see also Trust Fund Servs. v. Trojan Horse, Inc.*, 15 Wn. App. 140, 142, 548 P.2d 344, 347 (1976).

[122] Appellant's Brief, p.21.

project that will ultimately need to be duplicated in the future project."[124] Ms. Eide also demonstrates that the amount of engineering and staff time required to administer the contract well exceeds the 15% factor used under the Std. Specs.

Nova provides no factual support to bear on these issues. "An injured party claiming under a provision for liquidated damages does not have the burden of introducing evidence to establish actual damages."[125] Nova presented the trial court with no triable issues of fact concerning the City's entitlement to liquidated damages, the amount of time, or the daily rate. Nova's argument to the trial court was essentially that it was not properly terminated, therefore no liquidated damages should apply.

While Nova also argues that the contract is unconscionable, Washington courts "have stated that they will enforce a contract mutually and fairly agreed upon:

"There is no reason why persons, competent and free to contract, may not agree upon this subject (liquidated damages) as fully as upon any other, or why their agreement when fairly and understandingly

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[123] 25A C.J.S. Damages § 317 (2015).
[124] 2nd Declaration of Fran Eide, ¶7 [CP 222]
[125] 25A C.J.S. Damages § 317 (2015).

entered into with a view to just compensation for the anticipated loss, should not be enforced."[126] Nova presents no facts that would indicate that the Contract in this instance is unconscionable.

Additionally, contrary to Nova's assertion that the issue of unconscionability should not be decided on summary judgment, the Court has noted that "the determination of unconscionability is a question properly before the court on a motion for summary judgment, with a factual hearing mandatory only where the court accepts the possibility of unconscionability. Conversely, if there is no basis for such a possibility, no hearing is required."[127] "The burden of proving that a contract or contract clause is unconscionable lies upon the party attacking it."[128]

Beyond its bare assertion that the contract is a contract of adhesion, Nova presents no facts to support a finding of unconscionability. If Nova's arguments in this regard were accepted, each and every public works contract utilizing the WSDOT Std. Specs. or using the public bidding process would be deemed unconscionable.

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[126] ***Wallace***, 124. Wn.2d at 892 (citing *Brower v. Garrison*, 2 Wn. App. 424, 435, 468 P.2d 469 (1970)).

[127] ***Nelson v. McGoldrick***, 127 Wn.2d 124, 133, 896 P.2d 1258 (1995) (holding "that summary judgment may, under some circumstances, be appropriately granted . . . even in the face of a claim that a contract is unconscionable.")

Again, Nova asserts an absurd argument that should be rejected by the Court. To hold otherwise would be to invalidate every liquidated damages clause in every one of the thousands of public works contracts that utilize the Std. Specs. each and every year.

It must also be noted that Nova did not contest the 45 day duration or the daily rate of liquidated damages. Rather Nova contested liquidated damages as being unconscionable and unreasonable in general with no supporting facts. CR 56 requires a party resisting summary judgment to bring forth specific facts. Here, Nova offers general (and unsupported) legal arguments but presents no contested material facts. The uncontested facts are that the specific duration and rate of liquidated damages remain uncontested. The generalities and argument offered by Nova are insufficient to raise a question of fact and therefore must be rejected.

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[128] ***Tjart v. Smith Barney, Inc.***, 107 Wn. App. 885, 898, 28 P.3d 823, 830 (2001) (emphasis added).

5. The City Is Entitled To Award Of Its Attorney Fees On Appeal

In accord with RAP 18.1 the City requests award of fees on appeal. The trial court awarded fees and costs in accord with RCW 39.04.240 based upon the City's offer of settlement to Nova.[129]

Washington statute provides that RCW 4.84.250 shall apply to lawsuits involving public works. "RCW 4.84.250, made applicable to FCCC and King County through RCW 39.04.240, provides simply that "there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees."[130]

RCW 39.04.240 incorporates the provisions of RCW 4.84.250 et seq:

> § 39.04.240. Public works contracts -- Awarding of attorneys' fees
>
> (1) The provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW

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[129] Offer of Settlement, [CR 526-527].

[130] ***Frank Coluccio Constr. Co. v. King County***, 136 Wn. App. 751, 780 (2007).

> 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.
>
> (2) The rights provided for under this section may not be waived by the parties to a public works contract that is entered into on or after June 11, 1992, and a provision in such a contract that provides for waiver of these rights is void as against public policy. However, this subsection shall not be construed as prohibiting the parties from mutually agreeing to a clause in a public works contract that requires submission of a dispute arising under the contract to arbitration.[131]

Under RCW 4.84.270 the defendant is deemed the prevailing party entitled to attorney fees if the defendant makes an offer of settlement that is not accepted and the plaintiff recovers less than what is offered:

> § 4.84.270. Attorneys' fees as costs in damage actions of ten thousand dollars or less -- When defendant deemed prevailing party
>
> The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the

[131] RCW § 39.04.240.

> amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.
>
> Rev. Code Wn. (ARCW) § 4.84.270

The City made an offer that was not accepted. The City recovered a judgment in excess of the amount offered. Thus the City is the prevailing party entitled to its attorney fees on appeal under the statute. The statute has been generally held to apply to fees and costs on appeal. "The District was the prevailing party under RCW 39.04.240 and RCW 4.84.250 et seq. and is entitled to its attorneys' fees. We affirm and award attorneys' fees on appeal pursuant to RAP 18.1 and RCW 39.04.240 and 4.84.250."[132]

V. CONCLUSION

The trial court's dismissal of Nova's claims on summary judgment should be upheld in its entirety. The City did not breach its duties under the Contract. Nova waived any claims to the contrary by failing to protest the City Engineer's rejection of submittals and failing to request additional time to complete its work. The City was entitled to

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[132] ***Absher Const. Co. v. Kent Sch. Dist. No. 415***, 77 Wn. App. 137, 148–49, 890 P.2d 1071, 1077 (1995).

award of liquidated damages under the Contract and award of attorney fees and costs under RCW 39.04.240.

Respectfully submitted this 4th day of August, 2016.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By _____
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Standard Specifications

for Road, Bridge, and Municipal Construction

2012

M 41-10

Washington State Department of Transportation

EXHIBIT 9
PAGE 1 OF 10

1-04.4 Changes

The Engineer reserves the right to make, at any time during the Work, such changes in quantities and such alterations in the Work as are necessary to satisfactorily complete the project. Such changes in quantities and alterations shall not invalidate the Contract nor release the Surety, and the Contractor agrees to perform the Work as altered. Among others, these changes and alterations may include:

1. Deleting any part of the Work.
2. Increasing or decreasing quantities.
3. Altering Specifications, designs, or both.
4. Altering the way the Work is to be done.
5. Adding new Work.
6. Altering facilities, equipment, materials, services, or sites provided by the Contracting Agency.
7. Ordering the Contractor to speed up or delay the Work.

The Engineer will issue a written change order for any change unless the remainder of this Section provides otherwise.

If the alterations or changes in quantities significantly change the character of the Work under the Contract, whether or not changed by any such different quantities or alterations, an adjustment, excluding loss of anticipated profits, will be made to the Contract. The basis for the adjustment shall be agreed upon prior to the performance of the Work. If a basis cannot be agreed upon, then an adjustment will be made either for or against the Contractor in such amount as the Engineer may determine to be fair and equitable. If the alterations or changes in quantities do not significantly change the character of the Work to be performed under the Contract, the altered Work will be paid for as provided elsewhere in the Contract. The term *significant change* shall be construed to apply only to the following circumstances:

A. When the character of the Work as altered differs materially in kind or nature from that involved or included in the original proposed construction; or

B. When an item of Work, as defined elsewhere in the Contract, is increased in excess of 125 percent or decreased below 75 percent of the original Contract quantity. For the purpose of this Section, an item of Work will be defined as any item that qualifies for adjustment under the provisions of Section 1-04.6.

For item 1, an equitable adjustment for deleted Work will be made as provided in Section 1-09.5.

For item 2, if the actual quantity of any item, exclusive of added or deleted amounts included in agreed change orders, increases or decreases by more than 25 percent from the original Plan quantity, the unit Contract prices for that item may be adjusted in accordance with Section 1-04.6.

For any changes except item 1 (deleted Work) or item 2 (increasing or decreasing quantities), the Engineer will determine if the change should be paid for at unit Contract price(s). If the Engineer determines that the change increased or decreased the Contractor's costs or time to do any of the Work including unchanged Work, the Engineer will make an equitable adjustment to the Contract. The equitable adjustment will be by agreement with the Contractor. However, if the parties are unable to agree, the Engineer will determine the amount of the equitable adjustment in accordance with Section 1-09.4 and adjust the time as the Engineer deems appropriate. Extensions of time will be evaluated in accordance with Section 1-08.8. The Engineer's decision concerning equitable adjustment and extension of time shall be final as provided in Section 1-05.1.

EXHIBIT 9
PAGE 2 OF 10

The Contractor shall proceed with the Work upon receiving:

1. A written change order approved by the Engineer, or
2. An oral order from the Project Engineer before actually receiving the written change order.

Changes normally noted on field stakes or variations from estimated quantities, except as provided in subparagraph A or B above, will not require a written change order. These changes shall be made at the unit prices that apply. The Contractor shall respond immediately to changes shown on field stakes without waiting for further notice.

The Contractor shall obtain written consent of the Surety or Sureties if the Engineer requests such consent.

The Contracting Agency has a policy for the administration of cost reduction alternatives proposed by the Contractor. The Contractor may submit proposals for changing the Plans, Specifications, or other requirements of the Contract. These proposals must reduce the cost or time required for construction of the project. When determined appropriate by the Contracting Agency, the Contractor will be allowed to share the savings.

Guidelines for submitting Cost Reduction Incentive Proposals are available at the Project Engineer's office. The actions and requirements described in the guidelines are not part of the Contract. The guidelines requirements and the Contracting Agency's decision to accept or reject the Contractor's proposal are not subject to arbitration under the arbitration clause or otherwise subject to litigation.

1-04.4(1) Minor Changes

Payments or credits for changes amounting to $15,000 or less may be made under the Bid item "Minor Change". At the discretion of the Contracting Agency, this procedure for Minor Changes may be used in lieu of the more formal procedure as outlined in Section 1-04.4, Changes.

The Contractor will be provided a copy of the completed order for Minor Change. The agreement for the Minor Change will be documented by signature of the Contractor, or notation of verbal agreement. If the Contractor is in disagreement with anything required by the order for Minor Change, the Contractor may protest the order as provided in Section 1-04.5.

Payments or credits will be determined in accordance with Section 1-09.4. For the purpose of providing a common Proposal for all Bidders, the Contracting Agency has entered an amount for "Minor Change" in the Proposal to become a part of the total Bid by the Contractor.

1-04.5 Procedure and Protest by the Contractor

The Contractor accepts all requirements of a change order by: (1) endorsing it, (2) writing a separate acceptance, or (3) not protesting in the way this Section provides. A change order that is not protested as provided in this Section shall be full payment and final settlement of all claims for Contract time and for all costs of any kind, including costs of delays, related to any Work either covered or affected by the change. By not protesting as this Section provides, the Contractor also waives any additional entitlement and accepts from the Engineer any written or oral order (including directions, instructions, interpretations, and determinations).

If in disagreement with anything required in a change order, another written order, or an oral order from the Engineer, including any direction, instruction, interpretation, or determination by the Engineer, the Contractor shall:

1. Immediately give a signed written notice of protest to the Project Engineer or the Project Engineer's field Inspectors before doing the Work;
2. Supplement the written protest within 14 calendar days with a written statement and supporting documents providing the following:
   a. The date and nature of the protested order, direction, instruction, interpretation or determination;

EXHIBIT 9
PAGE 3 OF 10

b. A full discussion of the circumstances which caused the protest, including names of persons involved, time, duration and nature of the Work involved, and a review of the Plans and Contract Provisions referenced to support the protest;

c. The estimated dollar cost, if any, of the protested Work and a detailed breakdown showing how that estimate was determined;

d. An analysis of the progress schedule showing the schedule change or disruption if the Contractor is asserting a schedule change or disruption; and

e. If the protest is continuing, the information required above shall be supplemented upon request by the Project Engineer until the protest is resolved.

Throughout any protested Work, the Contractor shall keep complete records of extra costs and time incurred. The Contractor shall permit the Engineer access to these and any other records related to the protested Work as determined by the Engineer.

The Engineer will evaluate all protests provided the procedures in this Section are followed. If the Engineer determines that a protest is valid, the Engineer will adjust payment for Work or time by an equitable adjustment in accordance with Section 1-09.4. Extensions of time will be evaluated in accordance with Section 1-08.8. No adjustment will be made for an invalid protest.

If the Engineer determines that the protest is invalid, that determination and the reasons for it will be provided in writing to the Contractor. The determination will be provided within 14 calendar days after receipt of the Contractor's supplemental written statement (including any additional information requested by the Project Engineer to support a continuing protest) described in item 2 above.

If the Contractor does not accept the Engineer's determination then the Contractor shall pursue the dispute and claims procedures set forth in Section 1-09.11. In spite of any protest or dispute, the Contractor shall proceed promptly with the Work as the Engineer orders.

By failing to follow the procedures of Sections 1-04.5 and 1-09.11, the Contractor completely waives any claims for protested Work.

1-04.6 Variation in Estimated Quantities

Payment to the Contractor will be made only for the actual quantities of Work performed and accepted in conformance with the Contract. When the accepted quantity of Work performed under a unit item varies from the original Proposal quantity, payment will be at the unit Contract price for all Work unless the total accepted quantity of any Contract item, adjusted to exclude added or deleted amounts included in change orders accepted by both parties, increases or decreases by more than 25 percent from the original Proposal quantity. In that case, payment for Contract Work may be adjusted as described herein.

The adjusted final quantity shall be determined by starting with the final accepted quantity measured after all Work under an item has been completed. From this amount, subtract any quantities included in additive change orders accepted by both parties. Then, to the resulting amount, add any quantities included in deductive change orders accepted by both parties. The final result of this calculation shall become the adjusted final quantity and the basis for comparison to the original Proposal quantity.

1. **Increased Quantities** – Either party to the Contract will be entitled to renegotiate the price for that portion of the adjusted final quantity in excess of 1.25 times the original Proposal quantity. The price for excessive increased quantities will be determined by agreement of the parties, or, where the parties cannot agree, the price will be determined by the Engineer based upon the actual costs to perform the Work, including reasonable markup for overhead and profit.

2. **Decreased Quantities** – Either party to the Contract will be entitled to an equitable adjustment if the adjusted final quantity of Work performed is less than 75 percent of the original Bid quantity. The equitable adjustment shall be based upon and limited to three factors:

EXHIBIT 9 PAGE 4 OF 10

1-05 Control of Work

1-05.1 Authority of the Engineer

The Engineer shall be satisfied that all the Work is being done in accordance with the requirements of the Contract. The Contract and Specifications give the Engineer authority over the Work. Whenever it is so provided in this Contract, the decision of the Engineer shall be final; provided, however, that if an action is brought within the time allowed in this Contract challenging the Engineer's decision, that decision shall be subject to the scope of judicial review provided in such cases under Washington case law.

The Engineer's decisions will be final on all questions including, but not limited to, the following:

1. Quality and acceptability of materials and Work,
2. Measurement of unit price Work,
3. Acceptability of rates of progress on the Work,
4. Interpretation of Plans and Specifications,
5. Determination as to the existence of changed or differing site conditions,
6. Fulfillment of the Contract by the Contractor,
7. Payments under the Contract including equitable adjustment,
8. Suspension(s) of Work,
9. Termination of the Contract for default or public convenience,
10. Determination as to unworkable days, and
11. Approval of Working Drawings.

The Project Engineer represents the Engineer on the project, with full authority to enforce Contract requirements and carry out the Engineer's orders. If the Contractor fails to respond promptly to the requirements of the Contract or orders from the Engineer:

1. The Project Engineer may use Contracting Agency resources, other contractors, or other means to accomplish the Work; and
2. The Contracting Agency will not be obligated to pay the Contractor, and will deduct from the Contractor's payments any costs that result when any other means are used to carry out the Contract requirements or Engineer's orders.

At the Contractor's risk, the Project Engineer may suspend all or part of the Work according to Section 1-08.6.

Nothing in these Specifications or in the Contract requires the Engineer to provide the Contractor with direction or advice on how to do the Work. If the Engineer approves or recommends any method or manner for doing the Work or producing materials, the approval or recommendation shall not:

1. Guarantee that following the method or manner will result in compliance with the Contract,
2. Relieve the Contractor of any risks or obligations under the Contract, or
3. Create any Contracting Agency liability.

1-05.2 Authority of Assistants and Inspectors

The Project Engineer may appoint assistants and Inspectors to assist in determining that the Work and materials meet the Contract requirements. Assistants and Inspectors have the authority to reject defective material and suspend Work that is being done improperly, subject to the final decisions of the Project Engineer or, when appropriate, the Engineer.

Assistants and Inspectors are not authorized to accept Work, to accept materials, to issue instructions, or to give advice that is contrary to the Contract. Work done or material furnished which does not meet the Contract requirements shall be at the Contractor's risk and shall not be a basis for a claim even if the Inspectors or assistants purport to change the Contract.

EXHIBIT 9
PAGE 5 OF 10

Assistants and Inspectors may advise the Contractor of any faulty Work or materials or infringements of the terms of the Contract; however, failure of the Project Engineer or the assistants or Inspectors to advise the Contractor does not constitute acceptance or approval.

1-05.3 Plans and Working Drawings

The Contract Plans are defined in Section 1-01.3. Any proposed alterations by the Contractor affecting the requirements and information in the Contract Plans shall be in writing and will require approval of the Engineer.

To detail and illustrate the Work, the Engineer may furnish to the Contractor additional plans and explanations consistent with the original plans. The Contractor shall perform the Work according to these additional plans and explanations.

The Contractor shall submit supplemental Working Drawings as required for the performance of the Work. Except as noted, all drawings and other submittals shall be delivered directly to the Project Engineer. The drawings shall be on sheets measuring 22 by 34 inches, 11 by 17 inches, or on sheets with dimensions in multiples of 8½ by 11 inches. The drawings shall be provided far enough in advance of actual need to allow for the review process by the Contracting Agency or other agencies. This may involve resubmittals because of revisions or rejections. Unless otherwise stated in the Contract, the Engineer will require up to 30 calendar days from the date the submittals or resubmittals are received until they are sent to the Contractor. After a plan or drawing has been approved and returned to the Contractor, all changes that the Contractor proposes shall be submitted to the Project Engineer for review and approval. This time will increase if the drawings submitted do not meet the Contract requirements or contain insufficient details.

If more than 30 calendar days are required for the Engineer's review of any individual submittal or resubmittal, an extension of time will be considered in accordance with Section 1-08.8.

The Contractor shall obtain the Engineer's written approval of the drawings before proceeding with the Work they represent. This approval shall neither confer upon the Contracting Agency nor relieve the Contractor of any responsibility for the accuracy of the drawings or their conformity with the Contract. The Contractor shall bear all risk and all costs of any Work delays caused by nonapproval of these drawings or plans.

Unit Bid prices shall cover all costs of Working Drawings.

1-05.4 Conformity With and Deviations From Plans and Stakes

The Special Provisions may require that the Contractor be contractually responsible for part or all of the project surveying. For survey requirements not the responsibility of the Contractor, the Engineer will lay out and set construction stakes and marks needed to establish the lines, grades, slopes, cross-sections, and curve superelevations. These stakes and marks will govern the Contractor's Work. The Contractor shall take full responsibility for detailed dimensions, elevations, and slopes measured from them.

All Work performed shall be in conformity with the lines, grades, slopes, cross-sections, superelevation data, and dimensions as shown in the Plans, or as staked. If the Plans, Special Provisions, or these Specifications, state specific tolerances, then the Work shall be performed within those limits. The Engineer's decision on whether the Work is in conformity shall be final, as provided in Section 1-05.1.

The Contractor shall not deviate from the approved Plans and Working Drawings unless the Engineer approves in writing.

When the Contracting Agency is responsible for roadway surveying, and the Contractor trims the Subgrade with an automatic machine guided by reference lines, the Engineer will set control stakes for line and grade only once after grading is complete. To gain better control with unusual pavement widths or for other reasons, the Engineer may set more control stakes without added cost to the Contractor. The Contractor shall set reference lines from these control stakes for trimming Subgrade, for surfacing, and for controlling the grading machines.

EXHIBIT 9
PAGE 6 OF 10

The Contracting Agency considers the time specified in the Special Provisions as sufficient to do all the Work. For this reason, the Contracting Agency will not grant a time extension for:

1. Failure to obtain all materials and workers unless the failure was the result of exceptional causes as provided above in Subsection 7;
2. Changes, protests, increased quantities, or changed conditions (Section 1-04) that do not delay the completion of the Contract or prove to be an invalid or inappropriate time extension request;
3. Delays caused by nonapproval of drawings or plans as provided in Section 1-05.3;
4. Rejection of faulty or inappropriate equipment as provided in Section 1-05.9;
5. Correction of thickness deficiency as provided in Section 5-05.5(1)B.

The Engineer will determine whether the time extension should be granted, the reasons for the extension, and the duration of the extension, if any. Such determination will be final as provided in Section 1-05.1.

1-08.9 Liquidated Damages

Time is of the essence of the Contract. Delays inconvenience the traveling public, obstruct traffic, interfere with and delay commerce, and increase risk to Highway users. Delays also cost tax payers undue sums of money, adding time needed for administration, engineering, inspection, and supervision.

Because the Contracting Agency finds it impractical to calculate the actual cost of delays, it has adopted the following formula to calculate liquidated damages for failure to complete the physical Work of a Contract on time.

Accordingly, the Contractor agrees:

1. To pay (according to the following formula) liquidated damages for each working day beyond the number of working days established for Physical Completion, and
2. To authorize the Engineer to deduct these liquidated damages from any money due or coming due to the Contractor.

Liquidated Damages Formula

$$LD = \frac{0.15C}{T}$$

Where:

LD = liquidated damages per working day (rounded to the nearest dollar)
C = original Contract amount
T = original time for Physical Completion

When the Contract Work has progressed to the extent that the Contracting Agency has full use and benefit of the facilities, both from the operational and safety standpoint, all the initial plantings are completed and only minor incidental Work, replacement of temporary substitute facilities, plant establishment periods, or correction or repair remains to physically complete the total Contract, the Engineer may determine the Contract Work is substantially complete. The Engineer will notify the Contractor in writing of the Substantial Completion Date. For overruns in Contract time occurring after the date so established, the formula for liquidated damages shown above will not apply. For overruns in Contract time occurring after the Substantial Completion Date, liquidated damages shall be assessed on the basis of direct engineering and related costs assignable to the project until the actual Physical Completion Date of all the Contract Work. The Contractor shall complete the remaining Work as promptly as possible. Upon request by the Project Engineer, the Contractor shall furnish a written schedule for completing the physical Work on the Contract.

Liquidated damages will not be assessed for any days for which an extension of time is granted. No deduction or payment of liquidated damages will, in any degree, release the Contractor from further obligations and liabilities to complete the entire Contract.

EXHIBIT 9
PAGE 7 OF 10

94

1-08.10 Termination of Contract

1-08.10(1) Termination for Default

The Contracting Agency may terminate the Contract upon the occurrence of any one or more or the following events:

1. If the Contractor fails to supply sufficient skilled workers or suitable materials or equipment;
2. If the Contractor refuses or fails to prosecute the Work with such diligence as will ensure its Physical Completion within the original Physical Completion time and any extensions of time which may have been granted to the Contractor by change order or otherwise;
3. If the Contractor is adjudged bankrupt or insolvent, or makes a general assignment for the benefit of creditors, or if the Contractor or a third party files a petition to take advantage of any debtor's act or to reorganize under the bankruptcy or similar laws concerning the Contractor, or if a trustee or receiver is appointed for the Contractor or for any of the Contractor's property on account of the Contractor's insolvency, and the Contractor or its successor in interest does not provide adequate assurance of future performance in accordance with the Contract within 15 calendar days of receipt of a request for assurance from the Contracting Agency;
4. If the Contractor disregards laws, ordinances, rules, codes, regulations, orders or similar requirements of any public entity having jurisdiction;
5. If the Contractor disregards the authority of the Contracting Agency;
6. If the Contractor performs Work which deviates from the Contract, and neglects or refuses to correct rejected Work; or
7. If the Contractor otherwise violates in any material way any provisions or requirements of the Contract.

Once the Contracting Agency determines that sufficient cause exists to terminate the Contract, written notice shall be given to the Contractor and its Surety indicating that the Contractor is in breach of the Contract and that the Contractor is to remedy the breach within 15 calendar days after the notice is sent. In case of an emergency such as potential damage to life or property, the response time to remedy the breach after the notice may be shortened. If the remedy does not take place to the satisfaction of the Contracting Agency, the Engineer may, by serving written notice to the Contractor and Surety either:

1. Transfer the performance of the Work from the Contractor to the Surety; or
2. Terminate the Contract and at the Contracting Agency's option prosecute it to completion by contract or otherwise. Any extra costs or damages to the Contracting Agency shall be deducted from any money due or coming due to the Contractor under the Contract.

If the Engineer elects to pursue one remedy, it will not bar the Engineer from pursuing other remedies on the same or subsequent breaches.

Upon receipt of a notice that the Work is being transferred to the Surety, the Surety shall enter upon the premises and take possession of all materials, tools, and appliances for the purpose of completing the Work included under the Contract and employ by contract or otherwise any person or persons satisfactory to the Engineer to finish the Work and provide the materials without termination of the Contract. Such employment shall not relieve the Surety of its obligations under the Contract and the bond. If there is a transfer to the Surety, payments on estimates covering Work subsequent to the transfer shall be made to the extent permitted under law to the Surety or its agent without any right of the Contractor to make any claim.

If the Engineer terminates the Contract or provides such sufficiency of labor or materials as required to complete the Work, the Contractor shall not be entitled to receive any further payments on the Contract until all the Work contemplated by the Contract has been fully

EXHIBIT 9
PAGE 8 OF 10

performed. The Contractor shall bear any extra expenses incurred by the Contracting Agency in completing the Work, including all increased costs for completing the Work, and all damages sustained, or which may be sustained, by the Contracting Agency by reason of such refusal, neglect, failure, or discontinuance of Work by the Contractor. If liquidated damages are provided in the Contract, the Contractor shall be liable for such liquidated damages until such reasonable time as may be required for Physical Completion of the Work. After all the Work contemplated by the Contract has been completed, the Engineer will calculate the total expenses and damages for the completed Work. If the total expenses and damages are less than any unpaid balance due the Contractor, the excess will be paid by the Contracting Agency to the Contractor. If the total expenses and damages exceed the unpaid balance, the Contractor and the Surety shall be jointly and severally liable to the Contracting Agency and shall pay the difference to the State of Washington, Department of Transportation on demand.

In exercising the Contracting Agency's right to prosecute the Physical Completion of the Work, the Contracting Agency shall have the right to exercise its sole discretion as to the manner, method, and reasonableness of the costs of completing the Work. In the event that the Contracting Agency takes Bids for remedial Work or Physical Completion of the project, the Contractor shall not be eligible for the Award of such Contracts.

In the event the Contract is terminated, the termination shall not affect any rights of the Contracting Agency against the Contractor. The rights and remedies of the Contracting Agency under the Termination Clause are in addition to any other rights and remedies provided by law or under this Contract. Any retention or payment of monies to the Contractor by the Contracting Agency will not release the Contractor from liability.

If a notice of termination for default has been issued and it is later determined for any reason that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to Termination for Public Convenience in Section 1-08.10(2). This shall include termination for default because of failure to prosecute the Work, and the delay was found to be excusable under the provisions of Section 1-08.8.

1-08.10(2) Termination for Public Convenience

The Engineer may terminate the Contract in whole, or from time to time in part, whenever:

1. The Contractor is prevented from proceeding with the Work as a direct result of an Executive Order of the President with respect to the prosecution of war or in the interest of national defense; or an Executive Order of the President or Governor of the State with respect to the preservation of energy resources;
2. The Contractor is prevented from proceeding with the Work by reason of a preliminary, special, or permanent restraining order of a court of competent jurisdiction where the issuance of such restraining order is primarily caused by acts or omissions of persons or agencies other than the Contractor; or
3. The Engineer determines that such termination is in the best interests of the Contracting Agency.

1-08.10(3) Termination for Public Convenience Payment Request

After receipt of Termination for Public Convenience as provided in Section 1-08.10(2), the Contractor shall submit to the Contracting Agency a request for costs associated with the termination. The request shall be prepared in accordance with the claim procedures outlined in Sections 1-09.11 and 1-09.12. The request shall be submitted promptly but in no event later than 90 calendar days from the effective date of termination.

The Contractor agrees to make all records available to the extent deemed necessary by the Engineer to verify the costs in the Contractor's payment request.

EXHIBIT 9
PAGE 9 OF 10

1-09.4 Equitable Adjustment

The equitable adjustment provided for elsewhere in the Contract shall be determined in one or more of the following ways:

1. If the parties are able to agree, the price will be determined by using:
   a. Unit prices; or
   b. Other agreed upon prices;
2. If the parties cannot agree, the price will be determined by the Engineer using:
   a. Unit prices; or
   b. Other means to establish costs.

The following limitations shall apply in determining the amount of the equitable adjustment:

1. The equipment rates shall be actual cost but shall not exceed the rates set forth in the AGC/WSDOT Equipment Rental Agreement in effect at the time the Work is performed as referred to in Section 1-09.6, and
2. To the extent any delay or failure of performance was concurrently caused by the Contracting Agency and the Contractor, the Contractor shall be entitled to a time extension for the portion of the delay or failure of performance concurrently caused, provided it make such a request pursuant to Section 1-08.8; however, the Contractor shall not be entitled to any adjustment in Contract price.
3. No claim for anticipated profits on deleted, terminated, or uncompleted Work will be allowed.
4. No claim for consequential damages of any kind will be allowed.

1-09.5 Deleted or Terminated Work

The Engineer may delete Work by change order as provided in Section 1-04.4 or may terminate the Contract in whole or part as provided in Section 1-08.10(2). When the Contract is terminated in part, the partial termination shall be treated as a deletion change order for payment purposes under this Section.

Payment for completed items will be at unit Contract prices.

When any item is deleted in whole or in part by change order or when the Contract is terminated in whole or in part, payment for deleted or terminated Work will be made as follows:

1. Payment will be made for the actual number of units of Work completed at the unit Contract prices unless the Engineer determines the unit prices are inappropriate for the Work actually performed. When that determination is made by the Engineer, payment for Work performed will be as mutually agreed. If the parties cannot agree the Engineer will determine the amount of the equitable adjustment in accordance with Section 1-09.4;
2. Payment for partially completed lump sum items will be as mutually agreed. If the parties cannot agree, the Engineer will determine the amount of the equitable adjustment in accordance with Section 1-09.4;
3. To the extent not paid for by the Contract prices for the completed units of Work, the Contracting Agency will pay as part of the equitable adjustment those direct costs necessarily and actually incurred by the Contractor in anticipation of performing the Work that has been deleted or terminated;
4. The total payment for any one item in the case of a deletion or partial termination shall not exceed the Bid price as modified by approved change orders less the estimated cost (including overhead and profit) to complete the Work and less any amount paid to the Contractor for the item;
5. The total payment where the Contract is terminated in its entirety shall not exceed the total Contract price as modified by approved change orders less those amounts paid to the Contractor before the effective date of the termination; and

EXHIBIT 9
PAGE 10 OF 10

State – The state of Washington acting through its representatives.

Structures – Bridges, culverts, catch basins, drop inlets, retaining walls, cribbing, manholes, endwalls, buildings, service pipes, sewers, underdrains, foundation drains, and other features found during Work that the Contract may or may not classify as a Structure.

Subcontractor – An individual, partnership, firm, corporation, or joint venture who is sublet part of the Contract by the Contractor.

Subgrade – The top surface of the Roadbed on which subbase, base, surfacing, pavement, or layers of similar materials are placed.

Substructure – The part of the Structure *below*:

1. The bottom of the grout pad for the simple and continuous span bearing, or
2. The bottom of the girder or bottom slab soffit, or
3. Arch skewbacks and construction joints at the top of vertical abutment members or rigid frame piers.

Substructures include endwalls, wingwalls, barrier and railing attached to the wingwalls, and cantilever barriers and railings.

Superstructure – The part of the Structure *above*:

1. The bottom of the grout pad for the simple and continuous span bearing, or
2. The bottom of the girder or bottom slab soffit, or
3. Arch skewbacks and construction joints at the top of vertical abutment members or rigid frame piers,

and extending:

1. From the back of pavement seat to the back of pavement seat when the endwalls are attached to the Superstructure, or
2. From the expansion joint at the end pier to the expansion joint at the other end pier when the endwalls are not attached to the Superstructure.

Superstructures include, but are not limited to, girders, slab, barrier, and railing attached to the Superstructure.

Superstructures do not include endwalls, wingwalls, barrier and railing attached to the wingwalls, and cantilever barriers and railings unless supported by the Superstructure.

Surety – A company that is bound with the Contractor to ensure performance of the Contract, payment of all obligations pertaining to the Work, and fulfillment of such other conditions as are specified in the Contract, Contract Bond, or otherwise required by law.

Titles (or Headings) – The titles or headings of the Sections and Subsections herein are intended for convenience of reference and shall not be considered as having any bearing on their interpretation.

Traveled Way – That part of the Roadway made for vehicle travel excluding Shoulders and Auxiliary Lanes.

Work – The provision of all labor, materials, tools, equipment, and everything needed to successfully complete a project according to the Contract.

Working Drawings – Shop drawings, shop plans, erection plans, falsework plans, framework plans, cofferdam, cribbing and shoring plans, bending diagrams for reinforcing steel, or any other supplementary plans or similar data, including a schedule of submittal dates for Working Drawings where specified, which the Contractor must submit to the Engineer for approval.

EXHIBIT 21
PAGE 1 OF 16

1-08 Prosecution and Progress

1-08.1 Subcontracting

Work done by the Contractor's own organization shall account for at least 30 percent of the Awarded Contract price. Before computing this percentage, however, the Contractor may subtract (from the Awarded Contract price) the costs of any subcontracted Work on items the Contract designates as specialty items.

The Contractor shall not subcontract Work unless the Engineer approves in writing. Each request to subcontract shall be on the form the Engineer provides. If the Engineer requests, the Contractor shall provide proof that the Subcontractor has the experience, ability, and equipment the Work requires. The Contractor shall require each Subcontractor to comply with Section 1-07.9 and to furnish all certificates and statements required by the Contract.

Prior to subcontracting any Work, the Contractor shall verify that every first tier Subcontractor meets the responsibility criteria stated below at the time of subcontract execution. The Contractor shall include these responsibility criteria in every subcontract, and require every Subcontractor to:

1. Possess any electrical contractor license required by RCW 19.28 or elevator contractor license required by RCW 70.87, if applicable;
2. Have a certificate of registration in compliance with chapter RCW 18.27;
3. Have a current State unified business identifier number;
4. If applicable, have:
   a. Industrial insurance coverage for the bidder's employees working in Washington (Title 51 RCW);
   b. An employment security department number (Title 50 RCW);
   c. A State excise tax registration number (Title 82 RCW);
5. Not be disqualified from bidding on any public works contract under RCW 39.06.010 or RCW 39.12.065(3).
6. Verify these responsibility criteria for every lower tier subcontractor at the time of subcontract execution; and,
7. Include these responsibility criteria in every lower tier subcontract.

Along with the request to sublet, the Contractor shall submit the names of any contracting firms the Subcontractor proposes to use as lower tier subcontractors. Collectively, these lower tier subcontractors shall not do Work that exceeds 25 percent of the total amount subcontracted to a Subcontractor. When a Subcontractor is responsible for construction of a specific Structure or Structures, the following Work may be performed by lower tier Subcontractors without being subject to the 25 percent limitation:

1. Furnishing and driving of piling, or
2. Furnishing and installing concrete reinforcing and post-tensioning steel.

Except for the 25 percent limit, lower tier subcontractors shall meet the same requirements as Subcontractors.

The Engineer will approve the request only if satisfied with the proposed Subcontractor's record, equipment, experience, and ability. Approval to subcontract shall not:

1. Relieve the Contractor of any responsibility to carry out the Contract,
2. Relieve the Contractor of any obligations or liability under the Contract and the Contractor's bond,
3. Create any contract between the Contracting Agency and the Subcontractor, or
4. Convey to the Subcontractor any rights against the Contracting Agency.

The Contracting Agency will not consider as subcontracting: (1) purchase of sand, gravel, crushed stone, crushed slag, batched concrete aggregates, ready-mix concrete, off-site fabricated structural steel, other off-site fabricated items, and any other materials supplied by

established and recognized commercial plants; or (2) delivery of these materials to the Work site in vehicles owned or operated by such plants or by recognized independent or commercial hauling companies hired by those commercial plants. However, the Washington State Department of Labor and Industries may determine that RCW 39.12 applies to the employees of such firms identified in 1 and 2 above in accordance with WAC 296-127. If this should occur, the provisions of Section 1-07.9, as modified or supplemented, shall apply.

On all projects funded with Contracting Agency funds only, the Contractor shall certify to the actual amounts paid Disadvantaged, Minority, or Women's Business Enterprise firms that were used as Subcontractors, lower tier subcontractors, manufacturers, regular dealers, or service providers on the Contract. This Certification shall be submitted to the Project Engineer on WSDOT Form 421-023, Quarterly Report of Amounts Paid as MBE/WBE Participants, quarterly for the State fiscal quarters: January 1 through March 31, April 1 through June 30, July 1 through September 30, October 1 through December 31, and for any remaining portion of a quarter through Physical Completion of the Contract. The report is due 20 calendar days following the fiscal quarter end or 20 calendar days after Physical Completion of the Contract.

On all projects funded with both Contracting Agency funds and Federal assistance the Contractor shall submit a "Quarterly Report of Amounts Credited as DBE Participation" on a quarterly basis, in which DBE Work is accomplished, for every quarter in which the Contract is active or upon completion of the project, as appropriate. The quarterly reports are due on the 20th of April, July, October, and January for the four respective quarters. When required, this Quarterly Report of Amounts Credited as DBE Participation is in lieu of WSDOT Form 421-023, Quarterly Report of Amounts Paid as MBE/WBE Participants.

If dissatisfied with any part of the subcontracted Work, the Engineer may request in writing that the Subcontractor be removed. The Contractor shall comply with this request at once and shall not employ the Subcontractor for any further Work under the Contract.

1-08.1(1) Subcontract Completion and Return of Retainage Withheld

The following procedure shall apply to all subcontracts entered into as a part of this Contract:

Requirements

1. The Subcontractor shall make a written request to the Contractor for the release of the Subcontractor's retainage or retainage bond.
2. Within 10 working days of the request, the Contractor shall determine if the subcontract has been satisfactorily completed and shall inform the Subcontractor, in writing, of the Contractor's determination.
3. If the Contractor determines that the subcontract has been satisfactorily completed, the Subcontractor's retainage or retainage bond shall be released by the Contractor within 10 working days from the date of the written notice.
4. If the Contractor determines that the Subcontractor has not achieved satisfactory completion of the subcontract, the Contractor must provide the Subcontractor with written notice, stating specifically why the subcontract Work is not satisfactorily completed and what has to be done to achieve completion. The Contractor shall release the Subcontractor's retainage or retainage bond within 8 working days after the Subcontractor has satisfactorily completed the Work identified in the notice.
5. In determining whether satisfactory completion has been achieved, the Contractor may require the Subcontractor to provide documentation such as certifications and releases, showing that all laborers, lower-tiered subcontractors, suppliers of material and equipment, and others involved in the Subcontractor's Work have been paid in full. The Contractor may also require any documentation from the Subcontractor that is required by the subcontract or by the Contract between the Contractor and Contracting Agency or by law such as affidavits of wages paid, material acceptance certifications and releases from applicable governmental agencies to the extent that they relate to the Subcontractor's Work.

EXHIBIT 21
PAGE 3 OF 16 450

6. If the Contractor fails to comply with the requirements of the Specification and the Subcontractor's retainage or retainage bond is wrongfully withheld, the Subcontractor may seek recovery against the Contractor under applicable prompt pay statutes in addition to any other remedies provided for by the subcontract or by law.

Conditions

1. This clause does not create a contractual relationship between the Contracting Agency and any Subcontractor as stated in Section 1-08.1. Also, it is not intended to bestow upon any Subcontractor, the status of a third-party beneficiary to the Contract between the Contracting Agency and the Contractor.
2. This Section of the Contract does not apply to retainage withheld by the Contracting Agency from monies earned by the Contractor. The Contracting Agency shall continue to process the release of that retainage based upon the Completion Date of the project as defined in Section 1-08.5 Time for Completion and in accordance with the requirements and procedures set forth in RCW 60.28.

Payment

The Contractor will be solely responsible for any additional costs involved in paying retainage to the Subcontractors prior to total project completion. Those costs shall be incidental to the respective Bid items

1-08.2 Assignment

The Contractor shall not assign all or any part of the Work unless the Engineer approves in writing. The Engineer will not approve any proposed assignment that would relieve the original Contractor or Surety of responsibility under the Contract.

Money due (or that will become due) to the Contractor may be assigned. If given written notice, the Contracting Agency will honor such an assignment to the extent the law permits. But the assignment shall be subject to all setoffs, withholdings, and deductions required by law and the Contract.

1-08.3 Progress Schedule

1-08.3(1) General Requirements

The Contractor shall submit Type A or Type B Progress Schedules and Schedule Updates to the Engineer for approval. Schedules shall show Work that complies with all time and order of Work requirements in the Contract. Scheduling terms and practices shall conform to the standards established in *Construction Planning and Scheduling, Second Edition*, published by the Associated General Contractors of America. Except for Weekly Look-Ahead Schedules, all schedules shall meet these General Requirements, and provide the following information:

1. Include all activities necessary to physically complete the project.
2. Show the planned order of Work activities in a logical sequence.
3. Show durations of Work activities in working days as defined in Section 1-08.5.
4. Show activities in durations that are reasonable for the intended Work.
5. Define activity durations in sufficient detail to evaluate the progress of individual activities on a daily basis.
6. Show the Physical Completion of all Work within the authorized Contract time.

The Contracting Agency allocates its resources to a Contract based on the total time allowed in the Contract. The Contracting Agency may accept a Progress Schedule indicating an early Physical Completion Date but cannot guarantee the Contracting Agency's resources will be available to meet an accelerated schedule. No additional compensation will be allowed if the Contractor is not able to meet their accelerated schedule due to the unavailability of Contracting Agency's resources or for other reasons beyond the Contracting Agency's control.

If the Engineer determines that the Progress Schedule or any necessary Schedule Update does not provide the required information, then the schedule will be returned to the Contractor for correction and resubmittal.

451

EXHIBIT 21
PAGE 4 OF 16

The Engineer's approval of any schedule shall not transfer any of the Contractor's responsibilities to the Contracting Agency. The Contractor alone shall remain responsible for adjusting forces, equipment, and Work schedules to ensure completion of the Work within the time(s) specified in the Contract.

1-08.3(2) Progress Schedule Types

Type A Progress Schedules are required on all projects that do not contain the Bid item for Type B Progress Schedule. Type B Progress Schedules are required on all projects that contain the Bid item for Type B Progress Schedule. Weekly Look-Ahead Schedules and Schedule Updates are required on all projects.

1-08.3(2)A Type A Progress Schedule

The Contractor shall submit five copies of a Type A Progress Schedule no later than 10 days after the date the contract is executed, or some other mutually agreed upon submittal time. The schedule may be a critical path method (CPM) schedule, bar chart, or other standard schedule format. Regardless of which format is used, the schedule shall identify the critical path. The Engineer will evaluate the Type A Progress Schedule and approve or return the schedule for corrections within 15 calendar days of receiving the submittal.

1-08.3(2)B Type B Progress Schedule

The Contractor shall submit a preliminary Type B Progress Schedule no later than 5 calendar days after the date the Contract is executed. The preliminary Type B Progress Schedule shall comply with all of these requirements and the requirements of Section 1-08.3(1), except that it may be limited to only those activities occurring within the first 60 working days of the project.

The Contractor shall submit five copies of a Type B Progress Schedule depicting the entire project no later than 30 calendar days after the date the Contract is executed. The schedule shall be a critical path method (CPM) schedule developed by the Precedence Diagramming Method (PDM). Restraints may be utilized, but may not serve to change the logic of the network or the critical path. The schedule shall display at least the following information:

Contract Number and Title
Construction Start Date
Critical Path
Activity Description
Milestone Description
Activity Duration
Predecessor Activities
Successor Activities
Early Start (ES) and Early Finish (EF) for each activity
Late Start (LS) and Late Finish (LF) for each activity
Total Float (TF) and Free Float (FF) for each activity
Physical Completion Date
Data Date

The Engineer will evaluate the Type B Progress Schedule and approve or return the schedule for corrections within 15 calendar days of receiving the submittal.

1-08.3(2)C Vacant

1-08.3(2)D Weekly Look-Ahead Schedule

Each week that Work will be performed, the Contractor shall submit a Weekly Look-Ahead Schedule showing the Contractor's and all Subcontractors' proposed Work activities for the next two weeks. The Weekly Look-Ahead Schedule shall include the description, duration and sequence of Work, along with the planned hours of Work. This schedule may be a network

EXHIBIT 2A
PAGE 5 OF 16
452

schedule, bar chart, or other standard schedule format. The Weekly Look-Ahead Schedule shall be submitted to the Engineer by the midpoint of the week preceding the scheduled Work or some other mutually agreed upon submittal time.

1-08.3(3) Schedule Updates

The Engineer may request a Schedule Update when any of the following events occur:

1. The project has experienced a change that affects the critical path.
2. The sequence of Work is changed from that in the approved schedule.
3. The project is significantly delayed.
4. Upon receiving an extension of Contract time.

The Contractor shall submit five copies of a Type A or Type B Schedule Update within 15 calendar days of receiving a written request, or when an update is required by any other provision of the Contract. A "significant" delay in time is defined as 10 working days or 10 percent of the original Contract time, whichever is greater.

In addition to the other requirements of this Section, Schedule Updates shall reflect the following information:

1. The actual duration and sequence of as-constructed Work activities, including changed Work.
2. Approved time extensions.
3. Any construction delays or other conditions that affect the progress of the Work.
4. Any modifications to the as-planned sequence or duration of remaining activities.
5. The Physical Completion of all remaining Work in the remaining Contract time.

Unresolved requests for time extensions shall be reflected in the Schedule Update by assuming no time extension will be granted, and by showing the effects to follow-on activities necessary to physically complete the project within the currently authorized time for completion.

1-08.3(4) Measurement

No specific unit of measurement shall apply to the lump sum item for Type B Progress Schedule.

1-08.3(5) Payment

Payment will be made in accordance with Section 1-04.1, for the following Bid item when it is included in the Proposal:

"Type B Progress Schedule", lump sum.

The lump sum price shall be full pay for all costs for furnishing the Type B Progress Schedule and preliminary Type B Progress Schedule.

Payment of 80 percent of the lump sum price will be made upon approval of the Progress Schedule.

Payment will be increased to 100 percent of the lump sum price upon completion of 80 percent of the original total Contract Award amount.

All costs for providing Type A Progress Schedules and Weekly Look-Ahead Schedules are considered incidental to other items of Work in the Contract.

No payment will be made for Schedule Updates that are required due to the Contractors operations. Schedule Updates required by events that are attributed to the actions of the Contracting Agency will be paid for in accordance with Section 1-09.4.

1-08.4 Prosecution of Work

The Contractor shall begin Work within 21 calendar days from the date of execution of the Contract by the Contracting Agency, unless otherwise approved in writing. The Contractor shall diligently pursue the Work to the Physical Completion Date within the time specified in the Contract. Voluntary shutdown or slowing of operations by the Contractor shall not relieve

the Contractor of the responsibility to complete the Work within the time(s) specified in the Contract.

When shown in the Plans, the first order of work shall be the installation of high visibility fencing to delineate all areas for protection or restoration, as described in the Contract. Installation of high visibility fencing adjacent to the roadway shall occur after the placement of all necessary signs and traffic control devices in accordance with Section 1-10.1(2). Upon construction of the fencing, the Contractor shall request the Engineer to inspect the fence. No other work shall be performed on the site until the Contracting Agency has accepted the installation of high visibility fencing, as described in the Contract.

1-08.5 Time for Completion

The Contractor shall complete all physical Contract Work within the number of "working days" stated in the Contract Provisions or as extended by the Engineer in accordance with Section 1-08.8. Every day will be counted as a "working day" unless it is a nonworking day or an Engineer determined unworkable day. A nonworking day is defined as a Saturday, a Sunday, a whole or half day on which the Contract specifically prohibits Work on the critical path of the Contractor's approved progress schedule, or one of these holidays: January 1, the third Monday of January, the third Monday of February, Memorial Day, July 4, Labor Day, November 11, Thanksgiving Day, the day after Thanksgiving, and Christmas Day. When any of these holidays fall on a Sunday, the following Monday shall be counted a nonworking day. When the holiday falls on a Saturday, the preceding Friday shall be counted a nonworking day. The days between December 25 and January 1 will be classified as nonworking days.

An unworkable day is defined as a half or whole day the Engineer declares to be unworkable because of weather or conditions caused by the weather that prevents satisfactory and timely performance of the Work shown on the critical path of the Contractor's approved progress schedule. Other conditions beyond the control of the Contractor may qualify for an extension of time in accordance with Section 1-08.8.

Contract time shall begin on the first working day following the 21st calendar day after the date the Contracting Agency executes the Contract. If the Contractor starts Work on the project at an earlier date, then Contract time shall begin on the first working day when on-site Work begins. The Contract Provisions may specify another starting date for Contract time, in which case, time will begin on the starting date specified.

Each working day shall be charged to the Contract as it occurs, until the Contract Work is physically complete. If Substantial Completion has been granted and all the authorized working days have been used, charging of working days will cease. Each week the Engineer will provide the Contractor a statement that shows the number of working days: (1) charged to the Contract the week before; (2) specified for the Physical Completion of the Contract; and (3) remaining for the Physical Completion of the Contract. The statement will also show the nonworking days and any half or whole day the Engineer declares as unworkable. Within 10 calendar days after the date of each statement, the Contractor shall file a written protest of any alleged discrepancies in it. To be considered by the Engineer, the protest shall be in sufficient detail to enable the Engineer to ascertain the basis and amount of time disputed. By not filing such detailed protest in that period, the Contractor shall be deemed as having accepted the statement as correct.

The Engineer will give the Contractor written notice of the Physical Completion Date for all Work the Contract requires. That date shall constitute the Physical Completion Date of the Contract, but shall not imply the Secretary's acceptance of the Work or the Contract.

The Engineer will give the Contractor written notice of the Completion Date of the Contract after all the Contractor's obligations under the Contract have been performed by the Contractor. The following events must occur before the Completion Date can be established:

1. The physical Work on the project must be complete; and
2. The Contractor must furnish all documentation required by the Contract and required by law, to allow the Contracting Agency to process final acceptance of the Contract.

EXHIBIT 21
PAGE 7 OF 16
454

The following documents must be received by the Project Engineer prior to establishing a Completion Date:

a. Certified Payrolls (Federal-aid Projects)
b. Material Acceptance Certification Documents
c. Quarterly Reports of Amounts Paid as MBE/WBE Participants, or Quarterly Reports of Amounts Credited as DBE Participation, as required by the Contract Provisions.
d. Final Contract Voucher Certification

1-08.6 Suspension of Work

The Engineer may order suspension of all or any part of the Work if:

1. Unsuitable weather prevents satisfactory and timely performance of the Work; or
2. The Contractor does not comply with the Contract; or
3. It is in the public interest.

When ordered by the Engineer to suspend or resume Work, the Contractor shall do so immediately.

If the Work is suspended for reason (1) above, the period of Work stoppage will be counted as unworkable days. But if the Engineer believes the Contractor should have completed the suspended Work before the suspension, all or part of the suspension period may be counted as working days. The Engineer will set the number of unworkable days (or parts of days) by deciding how long the suspension delayed the entire project.

If the Work is suspended for reason (2) above, the period of Work stoppage will be counted as working days. The lost Work time, however, shall not relieve the Contractor from any Contract responsibility.

If the performance of all or any part of the Work is suspended, delayed, or interrupted for an unreasonable period of time by an act of the Contracting Agency in the administration of the Contract, or by failure to act within the time specified in the Contract (or if no time is specified, within a reasonable time), the Engineer will make an adjustment for any increase in the cost or time for the performance of the Contract (excluding profit) necessarily caused by the suspension, delay, or interruption. However, no adjustment will be made for any suspension, delay, or interruption if (1) the performance would have been suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or (2) an equitable adjustment is provided for or excluded under any other provision of the Contract.

If the Contractor believes that the performance of the Work is suspended, delayed, or interrupted for an unreasonable period of time and such suspension, delay, or interruption is the responsibility of the Contracting Agency, the Contractor shall immediately submit a written notice of protest to the Engineer as provided in Section 1-04.5. No adjustment shall be allowed for any costs incurred more than 10 calendar days before the date the Engineer receives the Contractor's written notice of protest. If the Contractor contends damages have been suffered as a result of such suspension, delay, or interruption, the protest shall not be allowed unless the protest (stating the amount of damages) is asserted in writing as soon as practicable, but no later than the date of the Contractor's signature on the Final Contract Voucher Certification. The Contractor shall keep full and complete records of the costs and additional time of such suspension, delay, or interruption and shall permit the Engineer to have access to those records and any other records as may be deemed necessary by the Engineer to assist in evaluating the protest.

The Engineer will determine if an equitable adjustment in cost or time is due as provided in this Section. The equitable adjustment for increase in costs, if due, shall be subject to the limitations provided in Section 1-09.4, provided that no profit of any kind will be allowed on any increase in cost necessarily caused by the suspension, delay, or interruption.

Request for extensions of time will be evaluated in accordance with Section 1-08.8.

The Engineer's determination as to whether an adjustment should be made will be final as provided in Section 1-05.1.

No claim by the Contractor under this clause shall be allowed unless the Contractor has followed the procedures provided in this Section and in Sections 1-04.5 and 1-09.11.

1-08.7 Maintenance During Suspension

Before and during any suspension (as described in Section 1-08.6) the Contractor shall protect the Work from damage or deterioration. Suspension shall not relieve the Contractor from anything the Contract requires unless this Section states otherwise.

At no expense to the Contracting Agency, the Contractor shall provide through the construction area a safe, smooth, and unobstructed Roadway for public use during suspension (as required in Section 1-07.23 or the Special Provisions). This may include a temporary road or detour.

If the Engineer determines that the Contractor failed to pursue the Work diligently before the suspension, or failed to comply with the Contract or orders, then the Contractor shall maintain the temporary Roadway in use during suspension. In this case, the Contractor shall bear the maintenance costs. If the Contractor fails to maintain the temporary Roadway, the Contracting Agency will do the Work and deduct all resulting costs from payments due to the Contractor.

If the Engineer determines that the Contractor has pursued the Work diligently before the suspension, then the Contracting Agency will maintain the temporary Roadway (and bear its cost). This Contracting Agency-provided maintenance work will include only routine maintenance of:

1. The Traveled Way, Auxiliary Lanes, Shoulders, and detour surface;
2. Roadway drainage along and under the traveled Roadway or detour; and
3. All barricades, signs, and lights needed for directing traffic through the temporary Roadway or detour in the construction area.

The Contractor shall protect and maintain all other Work in areas not used by traffic. All costs associated with protecting and maintaining such Work shall be the responsibility of the Contractor except those costs associated with implementing the TESC Plan according to Section 8-01.

After any suspension during which the Contracting Agency has done the routine maintenance, the Contractor shall accept the traveled Roadway or detour as is when Work resumes. The Contractor shall make no claim against the Contracting Agency for the condition of the Roadway or detour.

After any suspension, the Contractor shall resume all responsibilities the Contract assigns for the Work.

1-08.8 Extensions of Time

The Contractor shall submit any requests for time extensions to the Engineer in writing no later than 10 working days after the delay occurs. The requests for time extension shall be limited to the affect on the critical path of the Contractor's approved schedule attributable to the change or event giving rise to the request.

To be considered by the Engineer, the request shall be in sufficient detail (as determined by the Engineer) to enable the Engineer to ascertain the basis and amount of the time requested. The request shall include an updated schedule that supports the request and demonstrates that the change or event: (1) had a specific impact on the critical path, and except in cases of concurrent delay, was the sole cause of such impact, and (2) could not have been avoided by resequencing of the Work or by using other reasonable alternatives. If a request combined with previous extension requests, equals 20 percent or more of the original Contract time then the Contractor's letter of request must bear consent of Surety. In evaluating any request, the Engineer will consider how well the Contractor used the time from Contract execution up to the point of the delay and the effect the delay has on any completion times included in the Special Provisions. The Engineer will evaluate and respond within 15 calendar days of receiving the request.

The authorized time for Physical Completion will be extended for a period equal to the time the Engineer determines the Work was delayed because of:

1. Adverse weather causing the time requested to be unworkable, provided that the Engineer had not already declared the time to be unworkable and the Contractor has filed a written protest according to Section 1-08.5.
2. Any action, neglect, or default of the Contracting Agency, its officers, or employees, or of any other contractor employed by the Contracting Agency.
3. Fire or other casualty for which the Contractor is not responsible.
4. Strikes.
5. Any other conditions for which these Specifications permit time extensions such as:
   a. In Section 1-04.4 if a change increases the time to do any of the Work including unchanged Work.
   b. In Section 1-04.5 if increased time is part of a protest that is found to be a valid protest.
   c. In Section 1-04.7 if a changed condition is determined to exist that caused a delay in completing the Contract.
   d. In Section 1-05.3 if the Contracting Agency does not approve properly prepared and acceptable drawings within 30 calendar days.
   e. In Section 1-07.13 if the performance of the Work is delayed as a result of damage by others.
   f. In Section 1-07.17 if the removal or the relocation of any utility by forces other than the Contractor caused a delay.
   g. In Section 1-07.24 if a delay results from all the Right of Way necessary for the construction not being purchased and the Special Provisions does not make specific provisions regarding unpurchased Right of Way.
   h. In Section 1-08.6 if the performance of the Work is suspended, delayed, or interrupted for an unreasonable period of time that proves to be the responsibility of the Contracting Agency.
   i. In Section 1-09.11 if a dispute or claim also involves a delay in completing the Contract and the dispute or claim proves to be valid.
   j. In Section 1-09.6 for Work performed on a force account basis.
6. If the actual quantity of Work performed for a Bid item was more than the original Plan quantity and increased the duration of a critical activity. Extensions of time will be limited to only that quantity exceeding the original Plan quantity.
7. Exceptional causes not specifically identified in items 1 through 6, provided the request letter proves the Contractor had no control over the cause of the delay and could have done nothing to avoid or shorten it.

Working days added to the Contract by time extensions, when time has overran, shall only apply to days on which liquidated damages or direct engineering have been charged, such as the following:

If Substantial Completion has been granted prior to all of the authorized working days being used, then the number of days in the time extension will eliminate an equal number of days on which direct engineering charges have accrued. If the Substantial Completion Date is established after all of the authorized working days have been used, then the number of days in the time extension will eliminate an equal number of days on which liquidated damages or direct engineering charges have accrued.

The Engineer will not allow a time extension for any cause listed above if it resulted from the Contractor's default, collusion, action or inaction, or failure to comply with the Contract.

The Contracting Agency considers the time specified in the Special Provisions as sufficient to do all the Work. For this reason, the Contracting Agency will not grant a time extension for:

1. Failure to obtain all materials and workers unless the failure was the result of exceptional causes as provided above in Subsection 7;
2. Changes, protests, increased quantities, or changed conditions (Section 1-04) that do not delay the completion of the Contract or prove to be an invalid or inappropriate time extension request;
3. Delays caused by nonapproval of drawings or plans as provided in Section 1-05.3;
4. Rejection of faulty or inappropriate equipment as provided in Section 1-05.9;
5. Correction of thickness deficiency as provided in Section 5-05.5(1)B.

The Engineer will determine whether the time extension should be granted, the reasons for the extension, and the duration of the extension, if any. Such determination will be final as provided in Section 1-05.1.

1-08.9 Liquidated Damages

Time is of the essence of the Contract. Delays inconvenience the traveling public, obstruct traffic, interfere with and delay commerce, and increase risk to Highway users. Delays also cost tax payers undue sums of money, adding time needed for administration, engineering, inspection, and supervision.

Because the Contracting Agency finds it impractical to calculate the actual cost of delays, it has adopted the following formula to calculate liquidated damages for failure to complete the physical Work of a Contract on time.

Accordingly, the Contractor agrees:

1. To pay (according to the following formula) liquidated damages for each working day beyond the number of working days established for Physical Completion, and
2. To authorize the Engineer to deduct these liquidated damages from any money due or coming due to the Contractor.

Liquidated Damages Formula

$$LD = \frac{0.15C}{T}$$

Where:

LD = liquidated damages per working day (rounded to the nearest dollar)
C = original Contract amount
T = original time for Physical Completion

When the Contract Work has progressed to the extent that the Contracting Agency has full use and benefit of the facilities, both from the operational and safety standpoint, all the initial plantings are completed and only minor incidental Work, replacement of temporary substitute facilities, plant establishment periods, or correction or repair remains to physically complete the total Contract, the Engineer may determine the Contract Work is substantially complete. The Engineer will notify the Contractor in writing of the Substantial Completion Date. For overruns in Contract time occurring after the date so established, the formula for liquidated damages shown above will not apply. For overruns in Contract time occurring after the Substantial Completion Date, liquidated damages shall be assessed on the basis of direct engineering and related costs assignable to the project until the actual Physical Completion Date of all the Contract Work. The Contractor shall complete the remaining Work as promptly as possible. Upon request by the Project Engineer, the Contractor shall furnish a written schedule for completing the physical Work on the Contract.

Liquidated damages will not be assessed for any days for which an extension of time is granted. No deduction or payment of liquidated damages will, in any degree, release the Contractor from further obligations and liabilities to complete the entire Contract.

458

EXHIBIT 21
PAGE 11 OF 16

1-07.8(2) Non-Traffic Control Personnel

All personnel, except those performing the Work described in Section 1-10, shall wear high-visibility apparel meeting the ANSI/ISEA 107-2004 Class 2 or 3 standard.

1-07.9 Wages

1-07.9(1) General

This Contract is subject to the minimum wage requirements of RCW 39.12 and to RCW 49.28 (as amended or supplemented). On Federal-aid projects, Federal wage laws and rules also apply. The hourly minimum rates for wages and fringe benefits are listed in the Contract Provisions. When Federal wage and fringe benefit rates are listed, the rates match those identified by the U.S. Department of Labor's "Decision Number" shown in the Contract Provisions.

The Contractor, any Subcontractor, and all individuals or firms required by RCW 39.12, WAC 296-127, or the Federal Davis-Bacon and Related Acts (DBRA) to pay minimum prevailing wages, shall not pay any worker less than the minimum hourly wage rates and fringe benefits required by RCW 39.12 or the DBRA. Higher wages and benefits may be paid.

By including the hourly minimum rates for wages and fringe benefits in the Contract Provisions, the Contracting Agency does not imply that the Contractor will find labor available at those rates. The Contractor shall be responsible for any amounts above the minimums that will actually have to be paid. The Contractor shall bear the cost of paying wages above those shown in the Contract Provisions.

When the project is subject to both State and Federal hourly minimum rates for wages and fringe benefits and when the two rates differ for similar kinds of labor, the Contractor shall not pay less than the higher rate unless the State rates are specifically preempted by Federal law. When the project involves highway Work, heavy Work, and building Work, the Contract Provisions may list a Federal wage and fringe benefit rate for the highway Work, and a separate Federal wage and fringe benefit rate for both heavy Work and building Work. The area in which the worker is physically employed shall determine which Federal wage and fringe benefit rate shall be used to compare against the State wage and fringe benefit rate.

If employing labor in a class not listed in the Contract Provisions on state funded projects only, the Contractor shall request a determination of the correct wage and benefits rate for that class and locality from the Industrial Statistician, Washington State Department of Labor and Industries (State L&I), and provide a copy of those determinations to the Project Engineer.

If employing labor in a class not listed in the Contract Provisions on federally funded projects, the Contractor shall request a determination of the correct wage and benefit for that class and locality from the U.S. Secretary of Labor through the Project Engineer. Generally, the Contractor initiates the request by preparing standard form 1444 Request for Authorization of Additional Classification and Rate, available at www.wdol.gov/docs/sf1444.pdf, and submitting it to the Project Engineer for further action.

The Contractor shall ensure that any firm (Supplier, Manufacturer, or Fabricator) that falls under the provisions of RCW 39.12 because of the definition "Contractor" in WAC 296-127-010, complies with all the requirements of RCW 39.12.

The Contractor shall be responsible for compliance with the requirements of the DBRA and RCW 39.12 by all firms (Subcontractors, lower tier subcontractors, Suppliers, Manufacturers, or Fabricators) engaged in any part of the Work necessary to complete this Contract. Therefore, should a violation of this Subsection occur by any firm that is providing Work or materials for completion of this Contract whether directly or indirectly responsible to the Contractor, the Contracting Agency will take action against the Contractor, as provided by the provisions of the Contract, to achieve compliance, including but not limited to, withholding payment on the Contract until compliance is achieved.

In the event the Contracting Agency has an error (omissions are not errors) in the listing of the hourly minimum rates for wages and fringe benefits in the Contract Provisions, the Contractor, any Subcontractor, any lower tier subcontractor, or any other firm that is required to pay prevailing wages, shall be required to pay the rates as determined to be correct by State L&I (or by the U.S. Department of Labor when that agency sets the rates). A change order will be prepared to ensure that this occurs. The Contracting Agency will reimburse the Contractor for the actual cost to pay the difference between the correct rates and the rates included in the Contract Provisions, subject to the following conditions:

1. The affected firm relied upon the rates included in the Contract Provisions to prepare its Bid and certifies that it did so;
2. The allowable amount of reimbursement will be the difference between the rates listed and rates later determined to be correct plus only appropriate payroll markup the employer must pay, such as, social security and other payments the employer must make to the Federal or State Government;
3. The allowable amount of reimbursement may also include some overhead cost, such as, the cost for bond, insurance, and making supplemental payrolls and new checks to the employees because of underpayment for previously performed Work; and
4. Profit will not be an allowable markup.

Firms that anticipated, when they prepared their Bids, paying a rate equal to, or higher than, the correct rate as finally determined will not be eligible for reimbursement.

Listing Recovery Act (and other) new hire opportunities with the Employment Security Department.

There are many talented people currently unemployed. As the signs on the Contracting Agency's projects advertise, the Recovery Act is about creating jobs and putting people back to work. As a companion effort, the Employment Security Department has been charged with giving people the opportunity to compete for these jobs. Their tool for doing so is WorkSource. WorkSource is a free service located across the State that screens, shortlists, and refers qualified candidates.

WorkSource employees are aware that the Contractor has other commitments as part of your business practices and as part of the Contract. Contractors may be subject to hiring commitments such as Equal Employment Opportunity or union commitments. However, utilizing WorkSource can be an essential effort as part of their various good faith efforts.

WorkSource is a resource that is available across the State. Contractors who have been awarded WSDOT Contracts shall be prepared to discuss their recruitment plans and how WorkSource will be incorporated into that effort at the preconstruction conference. WorkSource has a simple process for requesting and reporting new hires.

The Contractor may contact the ARRA Business Unit at 877-453-5906 (toll free) or ARRA@esd.wa.gov. There is additional information available on the website at https://fortress.wa.gov/esd/worksource/.

1-07.9(2) Posting Notices

In a location acceptable to State L&I, the Contractor shall ensure the following is posted:

1. One copy of the approved "Statement of Intent to Pay Prevailing Wages" for the Contractor, each Subcontractor, each lower tier subcontractor, and any other firm (Supplier, Manufacturer, or Fabricator) that falls under the provisions of RCW 39.12 because of the definition of "Contractor" in WAC 296-127-010;
2. One copy of the prevailing wage rates for the project;
3. The address and telephone number of the Industrial Statistician for State L&I (along with notice that complaints or questions about wage rates may be directed there); and
4. FHWA 1495/1495A "Wage Rate Information" poster if the project is funded with Federal-aid.

460 PAGE EXHIBIT 21 13 OF 16

1-07.9(3) Apprentices

If employing apprentices, the Contractor shall submit to the Engineer written evidence showing:

1. Each apprentice is enrolled in a program approved by the Washington State Apprenticeship and Training Council;
2. The progression schedule for each apprentice; and
3. The established apprentice-journey level ratios and wage rates in the project locality upon which the Contractor will base such ratios and rates under the Contract. Any worker for whom an apprenticeship agreement has not been registered and approved by the Washington State Apprenticeship and Training Council shall be paid at the prevailing hourly journey level rate as provided in RCW 39.12.021.

1-07.9(4) Disputes

If labor and management cannot agree in a dispute over the proper prevailing wage rates, the Contractor shall refer the matter to the Director of State L&I (or to the U.S. Secretary of Labor when that agency sets the rates). The Director's (or Secretary's) decision shall be final, conclusive, and binding on all parties.

1-07.9(5) Required Documents

On forms provided by the Industrial Statistician of State L&I, the Contractor shall submit to the Engineer the following for itself and for each firm covered under RCW 39.12 that provided Work and materials for the Contract:

1. A copy of an approved "Statement of Intent to Pay Prevailing Wages" State L&I's form number F700-029-000. The Contracting Agency will make no payment under this Contract for the Work performed until this statement has been approved by State L&I and a copy of the approved form has been submitted to the Engineer.
2. A copy of an approved "Affidavit of Prevailing Wages Paid", State L&I's form number F700-007-000. The Contracting Agency will not release to the Contractor any funds retained under RCW 60.28.011 until all of the "Affidavit of Prevailing Wages Paid" forms have been approved by State L&I and a copy of all the approved forms have been submitted to the Engineer.

The Contractor shall be responsible for requesting these forms from State L&I and for paying any approval fees required by State L&I.

Certified payrolls are required to be submitted by the Contractor to the Engineer, for the Contractor and all Subcontractors or lower tier subcontractors, on all Federal-aid projects and, when requested in writing by the Engineer, on projects funded with only Contracting Agency funds. If these payrolls are not supplied within 10 calendar days of the end of the preceding weekly payroll period for Federal-aid projects or within 10 calendar days from the date of the written request on projects with only Contracting Agency funds, any or all payments may be withheld until compliance is achieved. Also, failure to provide these payrolls could result in other sanctions as provided by State laws (RCW 39.12.050) and/or Federal regulations (29 CFR 5.12). All certified payrolls shall be complete and explicit. Employee labor descriptions used on certified payrolls shall coincide exactly with the labor descriptions listed on the minimum wage schedule in the Contract unless the Engineer approves an alternate method to identify the labor used by the Contractor to compare with the labor listed in the Contract Provisions. When an apprentice is shown on the certified payroll at a rate less than the minimum prevailing journey wage rate, the apprenticeship registration number for that employee from the State Apprenticeship and Training Council shall be shown along with the correct employee classification code.

1-07.9(6) Audits

The Contracting Agency may inspect or audit the Contractor's wage and payroll records as provided in Section 1-09.12.

2. Are delivered to or stockpiled near the project or other Engineer-approved storage sites; and
3. Consist of: sand, gravel, surfacing materials, aggregates, reinforcing steel, bronze plates, structural steel, machinery, piling, timber and lumber (not including forms or falsework), large signs unique to the project, prestressed concrete beams or girders, or other materials the Engineer may approve.

The Contracting Agency may reimburse the Contractor for traffic signal controllers as follows:

1. Fifty percent when the traffic signal controller and all components are received and assembled into a complete unit at the State Materials Laboratory.
2. One hundred percent when the traffic signal controller is approved for shipment to the project by the State Materials Laboratory.

The Contractor shall provide sufficient written evidence of production costs to enable the Engineer to compute the cost of Contractor-produced materials (such as sand, gravel, surfacing material, or aggregates). For other materials, the Contractor shall provide invoices from material suppliers. Each invoice shall be detailed sufficiently to enable the Engineer to determine the actual costs. Payment for materials on hand shall not exceed the total Contract cost for the Contract item.

If payment is based upon an unpaid invoice, the Contractor shall provide the Engineer with a paid invoice within 60 calendar days after the Contracting Agency's initial payment for materials on hand. If the paid invoice is not furnished in this time, any payment the Contracting Agency had made will be deducted from the next progress estimate and withheld until the paid invoice is supplied.

The Contracting Agency will not pay for material on hand when the invoice cost is less than $2,000. As materials are used in the Work, credits equaling the partial payments for them will be taken on future estimates. Partial payment for materials on hand shall not constitute acceptance. Any material will be rejected if found to be faulty even if partial payment for it has been made.

1-09.9 Payments

The basis of payment will be the actual quantities of Work performed according to the Contract and as specified for payment.

The Contractor shall submit a breakdown of the cost of lump sum Items to enable the Project Engineer to determine the Work performed on a monthly basis. Lump sum item breakdowns shall be submitted prior to the first progress payment that includes payment for the Bid Item in question. A breakdown is not required for lump sum Items that include a basis for incremental payments as part of the respective Specification. Absent a lump sum breakdown, the Project Engineer will make a determination based on information available. The Project Engineer's determination of the cost of Work shall be final.

Payments will be made for Work and labor performed and materials furnished under the Contract according to the price in the Proposal unless otherwise provided.

Partial payments will be made once each month, based upon partial estimates prepared by the Engineer. The determination of payments under the Contract will be final in accordance with Section 1-05.1. Unless otherwise provided, payments will be made from the Motor Vehicle Fund.

Failure to perform any of the obligations under the Contract by the Contractor may be decreed by the Contracting Agency to be adequate reason for withholding any payments until compliance is achieved.

Upon completion of all Work and after final inspection (Section 1-05.11), the amount due the Contractor under the Contract will be paid based upon the final estimate made by the Engineer and presentation of a Final Contract Voucher Certification signed by the Contractor. Such voucher shall be deemed a release of all claims of the Contractor unless a claim is

filed in accordance with the requirements of Section 1-09.11 and is expressly excepted from the Contractor's certification on the Final Contract Voucher Certification. The date the Secretary signs the Final Contract Voucher Certification constitutes the final acceptance date (Section 1-05.12).

If the Contractor fails, refuses, or is unable to sign and return the Final Contract Voucher Certification or any other documentation required for completion and final acceptance of the Contract, the Contracting Agency reserves the right to establish a Completion Date (for the purpose of meeting the requirements of RCW 60.28) and unilaterally accept the Contract. Unilateral final acceptance will occur only after the Contractor has been provided the opportunity, by written request from the Engineer, to voluntarily submit such documents. If voluntary compliance is not achieved, formal notification of the impending establishment of a Completion Date and unilateral final acceptance will be provided by certified letter from the Secretary to the Contractor, which will provide 30 calendar days for the Contractor to submit the necessary documents. The 30 calendar day period will begin on the date the certified letter is received by the Contractor. The date the Secretary unilaterally signs the Final Contract Voucher Certification shall constitute the Completion Date and the final acceptance date (Section 1-05.12). The reservation by the Contracting Agency to unilaterally accept the Contract will apply to Contracts that are Physically Completed in accordance with Section 1-08.5, or for Contracts that are terminated in accordance with Section 1-08.10. Unilateral final acceptance of the Contract by the Contracting Agency does not in any way relieve the Contractor of their responsibility to comply with all Federal, State, tribal, or local laws, ordinances, and regulations that affect the Work under the Contract.

Payment to the Contractor of partial estimates, final estimates, and retained percentages shall be subject to controlling laws.

1-09.9(1) Retainage

Pursuant to RCW 60.28, a sum of 5 percent of the monies earned by the Contractor will be retained from progress estimates. Such retainage shall be used as a trust fund for the protection and payment (1) to the State with respect to taxes imposed pursuant to Title 82 RCW, and (2) the claims of any person arising under the Contract.

Monies retained under the provisions of RCW 60.28 shall, at the option of the Contractor, be:

1. Retained in a fund by the Contracting Agency; or
2. Deposited by the Contracting Agency in an escrow (interest-bearing) account in a bank, mutual saving bank, or savings and loan association (interest on monies so retained shall be paid to the Contractor). Deposits are to be in the name of the Contracting Agency and are not to be allowed to be withdrawn without the Contracting Agency's written authorization. The Contracting Agency will issue a check representing the sum of the monies reserved, payable to the bank or trust company. Such check shall be converted into bonds and securities chosen by the Contractor as the interest accrues.

At the time the Contract is executed the Contractor shall designate the option desired. The Contractor in choosing option (2) agrees to assume full responsibility to pay all costs that may accrue from escrow services, brokerage charges or both, and further agrees to assume all risks in connection with the investment of the retained percentages in securities. The Contracting Agency may also, at its option, accept a bond in lieu of retainage.

Release of the retainage will be made 60 days following the Completion Date (pursuant to RCW 39.12, and RCW 60.28) provided the following conditions are met:

1. On Contracts totaling more than $35,000, a release has been obtained from the Washington State Department of Revenue.
2. Affidavits of Wages Paid for the Contractor and all Subcontractors are on file with the Contracting Agency (RCW 39.12.040).
3. A certificate of Payment of Contributions Penalties and Interest on Public Works Contract is received from the Washington State Employment Security Department.

COA No. 48644-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

NOVA CONTRACTING, INC.,

Appellant,

v.

CITY OF OLYMPIA,

Respondent.

DECLARATION OF SERVICE

I, Tawnya Sarazin, under penalty of perjury under the laws of the State of Washington, hereby declare that on August 4, 2016, the following documents were served on the following individuals in the manner indicated:

1. *Brief of Respondent;* and

2. *Declaration of Service*

Attorneys for Plaintiff Nova Contracting, Inc.: Ben D. Cushman, WSBA #26358 Cushman Law Offices, P.S. 924 Capitol Way South Olympia, WA 98501	☐ Personal Service ☐ U.S. Mail ☐ Certified Mail ☒ Hand Delivered ☐ Overnight Mail ☐ Fax # ☐ Email: bencushman@cushmanlaw.com dmilward@cushmanlaw.com
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DATED this 4th day of August, 2016 at Bellevue, Washington.

Tawnya Sarazin, *Legal Assistant*